INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions and statute involved	2
Interest of the United States	2
Statement:	
1. The complaint	3
2. The pre-hearing proceedings in the state courts	5
3. The evidence on remand	6
4. Decision of the Circuit Court for Anne Arundel County on remand	11
5. The 1962 legislation apportioning the House of Delegates	11
6. The supplementary decision by the Circuit Court for Anne Arundel County	14
7. The decision of the Court of Appeals of Maryland	15
Summary of argument	16
Argument:	
Introduction	22
I. The equal protection clause guarantees qualified voters against arbitrary and unreasonable discrimination in the apportionment of seats in a state legislature	26
A. The Fourteenth Amendment secures equality of opportunity under law for participation in the process of self-government	28
B. Familiar principles of constitutional adjudication under the equal protection clause provide judicially manageable standards for its application to controversies over legislative apportionment	29
1. The basic standard of comparison is the representation accorded qualified vofers per capita	29

706-577—63——1

Argument—Continued

2. The equal protection clause is violated by an apportionment that creates gross inequalities in representation without rhyme or reason ..... Page 34

3. The equal protection clause is violated by a discriminatory apportionment based upon criteria which are contrary to express constitutional limitations or otherwise invidious or irrelevant 39

4. The equal protection clause is violated by an apportionment which subordinates the principle of popular representation to the representation of political subdivisions to such a degree as to create gross inequalities in the representation of voters and give control of the legislature to small minorities of the people 46

II. The present apportionment of the Maryland legislature denies petitioners equal protection of the laws 50

A. The apportionment of the Maryland Senate discriminates without rhyme or reason in favor of voters in both the rural counties and Baltimore City against voters in Baltimore, Prince George's and Montgomery Counties 50

B. The apportionment of the Maryland Legislature violates the equal protection clause by subordinating popular representation to the representation of political subdivisions to such a degree as to create gross inequalities among voters and give control to small minorities in both houses of the legislature 57

Conclusion 90

Appendix A 91

Appendix B ..... Separately printed and paginated

CITATIONS

Cases:

	Page
Asbury Park Press, Inc. v. *Woolley*, 33 N.J. 1	28
Baker v. *Carr*, 206 F. Supp. 341	26, 35, 39, 50, 71, 72
Baker v. *Carr*, 369 U.S. 186	2, 6, 16, 17, 22, 25, 26, 28, 29, 30, 34, 35, 39, 64, 90
Borden's Farm Products Co. v. *Baldwin*, 293 U.S. 194	90
Brown v. *Board of Education*, 347 U.S. 483	54, 55
Caesar v. *Williams*, 371 P. 2d 241 (Idaho Sup. Ct.), petition for rehearing denied, 371 P. 2d 255	27
Chastleton Corp. v. *Sinclair*, 264 U.S. 543	54
Davis v. *Mann*, No. 69, this Term	3, 22, 36, 87
Davis v. *Synhorst*, 217 F. Supp. 492	27, 50, 71
Fishman v. *White*, Superior Court, Suffolk County, Massachusetts, decided March 27, 1963	27, 28
Fortner v. *Barnett*, No. 59,965, Chancery Court, First Judicial District of Hinds County, Mississippi	27
Goesaert v. *Cleary*, 335 U.S. 464	33, 50
Gomillion v. *Lightfoot*, 364 U.S. 339	16, 28, 40
Gray v. *Sanders*, 372 U.S. 368	16, 28, 30, 32, 41, 81
Griffin v. *Illinois*, 351 U.S. 12	55, 66
Harris v. *Shanahan*, District Court, Shawnee County, Kansas, decided May 31, 1963	27
Harris v. *Shanahan*, District Court, Shawnee County, Kansas, decided July 26, 1962	27
Hartford Steam Boiler Inspection Co. v. *Harrison*, 301 U.S. 459	90
Hebert v. *Louisiana*, 272 U.S. 312	41
Howard County Commissioners v. *Matthews*, 146 Md. 553	80
Hunter v. *Pittsburgh*, 207 U.S. 161	80
Jackman v. *Rodine*, 78 N.J. Super. 414	28, 39, 82
League of Nebraska Municipalities v. *Marsh*, 209 F. Supp. 189	27
Levitt v. *Maynard*, 104 N.H. 243	27
Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61	33, 66
Lisco v. *McNichols*, 208 F. Supp. 471	26, 51
MacDougall v. *Green*, 335 U.S. 281	85
Mann v. *Davis*, 213 F. Supp. 577, pending on appeal, No. 69, this Term	27, 39, 50, 71, 82, 88

Cases—Continued

Page

McGowan v. *Maryland*, 366 U.S. 420 33
Minersville School District v. *Gobitis*, 310 U.S. 586 69
Morey v. *Doud*, 354 U.S. 457 33
Moss v. *Burkhart*, 207 F. Supp. 885 ..... 27, 51
Moss v. *Burkhart*, U.S.D.C., W.D. Okla., decided July 17, 1963 ..... 27, 39, 51
Nixon v. *Condon*, 286 U.S. 73 ..... 16, 28
Nixon v. *Herndon*, 273 U.S. 536 28
Nolan v. *Rhodes*, U.S.D.C., S.D. Ohio, decided June 12, 1963 ..... 27, 72, 82
Oyama v. *California*, 332 U.S. 633 66
Phillips Chemical Co. v. *Dumas School District*, 361 U.S. 376 33
Ragland v. *Anderson*, 125 Ky. 141 29
Railway Express Agency v. *New York*, 336 U.S. 106 66
Reynolds v. *Sims*, Nos. 23, 27, 41, this Term 2, 22, 35
Royster Guano Co. v. *Virginia*, 253 U.S. 412 33
Scholle v. *Secretary of State*, 367 Mich. 176, pending on appeal *sub nom. Beadle* v. *Scholle*, No. 24, this Term 27, 47, 51
Sims v. *Frink*, 208 F. Supp. 431, pending on appeal *sub nom. Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term 26, 50, 71, 72, 82
Sincock v. *Duffy*, 215 F. Supp. 169, pending on appeal *sub nom. Roman* v. *Sincock*, No. 307, this Term 27, 39, 51, 82
Skinner v. *Oklahoma*, 316 U.S. 535 ..... 40, 44, 55, 66, 67
Sobel v. *Adams*, 208 F. Supp. 316 ..... 26, 39, 71, 72
Sobel v. *Adams*, 208 F. Supp. 319 26
Sobel v. *Adams*, 214 F. Supp. 811 26
South v. *Peters*, 339 U.S. 276 ..... 17, 33
Sweeney v. *Notte*, 183 A. 2d 296 (R.I. Sup. Ct.) 27, 39, 51, 71, 72
Takahashi v. *Fish and Game Commission*, 334 U.S. 410 67
Terrace v. *Thompson*, 263 U.S. 197 66
Thigpen v. *Meyers*, 211 F. Supp. 826, pending on appeal, No. 381, this Term 27, 39, 51
Toombs v. *Fortson*, 205 F. Supp. 248 ..... 27, 39, 51, 80
Toombs v. *Fortson*, U.S.D.C., N.D. Ga., decided September 5, 1962 ..... 27, 51, 82

Cases—Continued Page
United States v. *Carolene Products Co.*, 304 U.S. 144 69
WMCA, Inc. v. *Simon*, 208 F. Supp. 368, pending on appeal, No. 20, this Term 27
WMCA, Inc. v. *Simon*, No. 20, this Term 3, 22, 43, 50, 71, 89
Wesberry v. *Sanders*, pending on appeal, No. 22, this Term 22
Wesberry v. *Vandiver*, 206 F. Supp. 276, pending on appeal, No. 22, this Term 39, 81
West Virginia State Board of Education v. *Barnette*, 319 U.S. 624 69
Wisconsin v. *Zimmerman*, 209 F. Supp. 183 27
Yick Wo v. *Hopkins*, 118 U.S. 356 68
Constitutions and statutes:
U.S. Constitution:
First Amendment 65
Fourteenth Amendment 2 *in passim*
Sec. 1 4
Fifteenth Amendment 40
Nineteenth Amendment 40
Crawford-Webb Act 35, 48
Northwest Ordinance, Sec. 14, Art. II 61
28 U.S.C. 1343 4, 5
42 U.S.C. 1983 4, 5
Maryland Constitutions:
1776 64
Article XIV 82
Amendment of 1937 83
1851, Article 3, Sec. 3 83
1864, Article III, Secs. 2, 3 83
1867, as amended:
Article III:
Sec. 1 2, 6, 91
Sec. 2 2, 4, 5, 6, 7, 14, 70, 83, 88, 91
Sec. 4 7
Sec. 5 2, 4, 5, 7, 8, 11, 14, 91
Sec. 6 88
Article XIV 5
Sec. 1 10, 70
Sec. 2 10, 70, 71
Article XVII, Sec. 9 10, 70

Constitutions and statutes—Continued Page
Maryland Code (1962 Supp.), Article 40, Sec. 42 2, 7, 11, 12, 92
Maryland Declaration of Rights:
Article 1 5
Article 7 4, 5
Article 45 5
Maryland Laws:
1900, ch. 469 83
1922, ch. 7 83
New Hampshire Constitution, Pt. 2, Article 26th 44
Virginia Constitution of 1776 61
Miscellaneous:
Baker, *Rural versus Urban Political Power* (1955) 24
2 Cooley, *Constitutional Limitations* (8th ed., 1927) 69
I David & Eisenberg, *Devaluation of the Urban and Suburban Vote: A Statistical Evaluation of Long-Term Trends in State Legislative Representation* (University of Virginia, 1961) 31, 84
Emerson, *Malapportionment and Judicial Power*, 72 Yale L. J. 64 87
Federalist Papers (Cooke ed., 1961) 79
Hacker, *Congressional Districting: The Issue of Equal Representation* (Brookings Institution, 1963) 61, 89
Kennedy, *The Shame of the States*, N.Y. Times Magazine, May 18, 1958 23
Key, *American State Politics: An Introduction* (1956) 24
McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 Mich. L. Rev. 645 68, 82
McKay, *Reapportionment and the Federal Analogy* (National Municipal League, 1962) 82, 90
One Man—One Vote, A Statement of Basic Principles of Legislative Apportionment (Twentieth Century Fund, 1962) 23, 82, 87, 89
Records of the Federal Convention (Farrand ed., 1911) 63, 75, 76, 77, 78, 79, 88
4 Revised Record of the Constitutional Convention of 1894 of the State of New York 53–54
Selected Bibliography on Legislative Apportionment and Districting (Silva and Boyd ed., National Municipal League, 1963) 24
Smith, *John Adams* (1962) 85

Miscellaneous—Continued
Strout, *The Next Election Is Already Rigged*, Harper's (November 1959), reprinted at 106 Cong. Rec. A519–521 ..... Page 24
United States Advisory Commission on Intergovernmental Relations, *Report: Apportionment of State Legislatures* (1962) 23–24, 89
United States Commission on Intergovernmental Relations, *Report to the President* (1955) 23
Wilson, *The State* (1898), pp. 487–489 88

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 29

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., APPELLANTS

v.

J. MILLARD TAWES, GOVERNOR OF THE STATE OF MARYLAND, ET AL.

ON APPEAL FROM THE MARYLAND COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Maryland Court of Appeals (R. 162–191) is reported at 229 Md. 406, 184 A. 2d 715. A prior opinion of the Maryland Court of Appeals is reported at 228 Md. 412, 180 A. 2d 656. The opinions of the Circuit Court for Anne Arundel County (R. 100–109, 113–122) are not reported.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on July 23, 1962 (R. 124, 163). The notice of appeal to this Court was filed on September 28, 1962, and probable jurisdiction was noted on June 10, 1963 (R. 193–197). The jurisdiction of this Court rests upon 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the apportionment of seats in the Maryland Senate on the basis of one senator for each county and each of six legislative districts in the City of Baltimore, which grossly discriminates in *per capita* representation against voters in populous counties and in favor of voters in the populous City of Baltimore as well as the rural counties, is so arbitrary and capricious as to violate the equal protection clause of the Fourteenth Amendment.

2. Whether the discrimination against voters in populous counties in *per capita* representation in the Maryland Senate, that results from allocating each county one senator regardless of population, taken in conjunction with the lack of equal representation in the House of Delegates, is so gross in relation to any permissible objective of legislative apportionment as to constitute a denial of equal protection of the laws.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Sections 1, 2, and 5 of Article III of the 1867 Maryland Constitution are set forth in Appendix A, p. 91, below. Section 42 of Article 40, Maryland Code (1962 Supp.), is set forth in Appendix A, pp. 92–96 below.

INTEREST OF THE UNITED STATES

In *Baker* v. *Carr*, 369 U.S. 186, the United States appeared as *amicus curiae* to argue that the federal courts have power to consider whether the apportionment of State legislatures violates the Fourteenth Amendment. The Court held that the federal courts have this power. This case, along with *Reynolds* v.

Sims, Nos. 23, 27, 41, *Davis* v. *Mann*, No. 69, and *WMCA, Inc.* v. *Simon*, No. 20, touches the basic substantive issue left undecided in *Baker* v. *Carr*—whether, and to what extent, the Fourteenth Amendment prohibits malapportionment of State legislatures.

These cases involve the most important right in a democracy, the right to fair representation in one's own government. In each of the four States the legislature is apportioned so as to discriminate egregiously in favor of some voters at the expense of others. This discrimination, principally against urban voters, has at least two consequences. *First*, they are deprived of their fundamental right to share fairly in choosing their own government. *Second*, the extreme underrepresentation of urban voters has resulted in discrimination by the State legislatures against urban areas in the States' exercise of governmental powers. More particularly, the underrepresentation of urban voters has been a dominant factor in the widespread failure of the States to meet growing urban problems. Thus, these cases involve both the constitutional rights and the general welfare of millions of American citizens.

STATEMENT

1. *The Complaint.* On August 12, 1960, the plaintiffs-appellants—six residents and voters of Baltimore City and three urban counties of Maryland, and an unincorporated association on behalf of its members—filed a complaint in the Circuit Court of Anne Arundel County challenging the apportionment of the Maryland legislature (R. 1–50). The defendants, who

were sued in their representative capacities as officials charged with duties in connection with State elections, include the Governor; the Maryland Board of State Canvassers, consisting of the Attorney General, Secretary of State, Comptroller of the Treasury, Treasurer, and Clerk of the Maryland Court of Appeals; and the Board of Election Supervisors of Anne Arundel County and its three members (R. 2–3).

The plaintiffs alleged that the apportionment of both houses of the Maryland legislature, pursuant to Article III, §§ 2 and 5 of the Maryland Constitution (see Appendix A, p. 91 below), seriously discriminated against inhabitants of Baltimore City and the urban counties in which they resided by giving these voters substantially less representation than an equal number of persons residing elsewhere in the State (R. 8–11). They claimed that this malapportionment violated Section 1 of the Fourteenth Amendment since that section prohibits any State from "denying, diluting or restricting the equality of voting rights or privileges among classes of otherwise eligible voters similarly situated" (R. 8). Furthermore, they alleged, the discrimination against the plaintiffs and other eligible voters in Baltimore City and four urban counties violated the equal protection clause of the Fourteenth Amendment, the Federal Civil Rights statutes (28 U.S.C. 1343 and 42 U.S.C. 1983), and Article 7 of the Maryland Declaration of Rights (R. 9–11).

Plaintiffs sought a declaratory judgment that Article III, §§ 2 and 5 violates the Fourteenth Amend-

ment and the Civil Rights statutes, 28 U.S.C. 1343 and 42 U.S.C. 1983; that the failure of the General Assembly to reapportion its membership in accordance with a formula which would reasonably reflect the present population of Baltimore City and the 23 counties of Maryland violates the Fourteenth Amendment, the federal Civil Rights statutes, and Article 7 of the Maryland Declaration of Rights; and that the failure of the General Assembly to convene a constitutional convention as approved in the general election of 1950 violates Article XIV of the Maryland Constitution and Articles 1, 7, and 45 of the Maryland Declaration of Rights (R. 18–19). Plaintiffs also asked that, unless the November 1962 election and elections thereafter were conducted on an at-large basis, the court enjoin the defendants from performing certain election duties (*i.e.*, issuing commissions to candidates, certifying the election of candidates, etc.) until such time as the General Assembly should submit for a referendum vote by the eligible State voters an amendment to Article III, §§ 2 and 5, which would reapportion the membership of the General Assembly on the basis of population in conformity with the Fourteenth Amendment (R. 19–20). Plaintiffs also requested the court to retain jurisdiction over the cause until such time as the General Assembly should submit to the voters such a constitutional amendment (R. 20).

2. *The Pre-hearing Proceedings in the State Courts.* Circuit Judge O. Bowie Duckett, sitting as Chancellor, initially sustained demurrers and dismissed the complaint without leave to amend (R. 53).

The Court of Appeals of Maryland reversed the order of the Circuit Court and remanded for a hearing on the merits (R. 54–86, 87). *Maryland Committee for Fair Representation* v. *Tawes,* 228 Md. 412, 180 A. 2d 656. The court held that the complaint alleged a justiciable cause of action; that there was a "strong implication" in *Baker* v. *Carr,* 369 U.S. 186, "that there must be some reasonable relationship of population, or eligible voters, to representation in the General Assembly, if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination"; that an "inquiry into the rational basis for [the] apportionment [of the Maryland General Assembly] seems to be called for"; and that the chancellor, on remand, should determine "whether or not an invidious discrimination does exist with respect to representation in either or both houses" (R. 64–66, 70–73).

3. *The Evidence on Remand.* The Constitution of Maryland (see Appendix A, p. 91 below) vests legislative power in a bicameral General Assembly consisting of a Senate and a House of Delegates. Art. III, § 1. As to the apportionment of the Senate, Article III, § 2, provides:

> The City of Baltimore shall be divided into six legislative districts as near as may be of equal population and of contiguous territory, and each of said legislative districts of Baltimore City, as they may from time to time be laid out, in accordance with the provisions hereof, and each county in the State, shall be entitled to one Senator, who shall be elected by the quali-

> fied voters of the said legislative districts of Baltimore City and of the counties of the State, respectively, and shall serve for four years from the date of his election.

Article III, § 5, provides concerning the apportionment of the lower house: [1]

> The membership of the House of Delegates shall consist of one hundred and twenty-three (123) Delegates, apportioned as follows: Calvert, Caroline, Charles, Howard, Kent, Queen Anne's, and St. Mary's Counties, two Delegates each; Cecil, Garrett, Somerset, Talbot and Worcester Counties, three Delegates each; Carroll, Dorchester, Harford, and Wicomico Counties, four Delegates each; Allegany, Anne Arundel, Baltimore, Frederick, Montgomery, Prince George's, and Washington Counties, and each of the six legislative districts of Baltimore City, six Delegates each.[2]

---

[1] This section was held unconstitutional by the Maryland courts during the present litigation, and has been superseded by temporary legislation (40 Maryland Code (1962 Supp.) § 42) which is discussed below, pp. 11–14.

[2] The Constitution of 1867, Article III, § 4, provided for a minimum of two delegates per county, with increases up to a total of six based on population up to 55,000 people, but it made no provision for additional delegates after a county reached 55,000. In 1950, Article III, § 5 was adopted as a constitutional amendment freezing the representation in the House of Delegates on the basis of the apportionment under the federal census of 1940 (R. 32–33). Article III, § 4 of the Maryland Constitution, as amended, provides for altering the boundaries of the legislative districts of Baltimore City to provide approximately equal population in the districts.

The Constitution contains no provisions for reapportionment of the General Assembly. Thus, at the time the complaint was filed, the Senate consisted of 29 senators—one from each of the State's 23 counties and one from each of the six districts of Baltimore—and the House of Delegates consisted of 123 delegates apportioned according to Article III, § 5.

At the hearing, the evidence (and computations therefrom) showed that, while Baltimore City and the Counties of Anne Arundel, Baltimore, Montgomery and Prince George's had an aggregate 1960 population of 2,336,409, or 75.3 percent of the total 1960 State population of 3,100,689, they were represented by only 10 senators, or 34.5 percent of the members of the Senate. On the other hand, the remaining 19 counties, with an aggregate population of 764,280, or 24.7 percent of the total State population in 1960, were represented by 19 senators, or 65.5 percent of the members of the Senate. (R. 97, 184–185.) The 15 least populous counties, with an aggregate 1960 population of 440,240, or 14.1 percent of the total State population, had 15 of the 29 senators, *i.e.*, control of the Senate (R. 27,[3] 97). The following table shows the extent of the disparities as among the pop-

[3] The correct population figures for 1960 are at R. 97, not R. 27. The most convenient tables are attached to the dissenting opinion at R. 185–186.

ulous counties, the City of Baltimore and an illustrative sampling of overrepresented counties.

County (or Baltimore City)	Total population (1960)	Number of senators	Population per senator	Ratio to most underrepresented county
Baltimore	492,428	1	492,428	1.00
Prince George's	357,395	1	357,395	1.37
Montgomery	340,928	1	340,928	1.44
Anne Arundel	206,634	1	206,634	2.38
Baltimore City	939,024	6	156,506	3.14
Washington	91,219	1	91,219	5.39
Cecil	48,408	1	48,408	10.17
Charles	32,572	1	32,572	15.11
Somerset	19,623	1	19,623	25.09
Kent	15,481	1	15,481	31.81
State total	3,100,689	29	106,920	4.61

The evidence also showed such disparities in *per capita* representation in the House of Delegates that, at the time the complaint was filed, Baltimore City and the Counties of Anne Arundel, Baltimore, Montgomery and Prince George's, with 75.3 percent of the total population of the State in 1960, elected only 60 delegates, or 48.7 percent of the House of Delegates; the remaining 19 counties, with 24.7 percent of the total population, had 63 delegates, or 51.3 percent (R. 27, 97). Since the apportionment of the House was modified slightly by a statute passed after the constitutional apportionment was held unconstitutional, we omit further details.

As to plaintiffs' allegation that no adequate nonjudicial relief was available to them, the defendants admitted that between 1951 and 1959 ten reapportionment bills were introduced into the General Assembly, but that all failed to pass because of opposition

of legislators from the less populous counties; and that, in 1960, neither house of the General Assembly passed bills incorporating reapportionment recommendations of a special Commission, which was created by the Governor in 1959 to investigate and report on the question (R. 11–12, 28–45, 93). The plaintiffs supported their claim that relief through constitutional amendment would be "futile" (R. 5–6, 12–13) by showing that Article XIV, § 1, of the Maryland Constitution requires a 3/5 affirmative vote of the membership of each house of the General Assembly in order to submit constitutional amendments to the voters and that the "less populous counties" control each house of the General Assembly. As to Article XIV, § 2, and Article XVII, § 9, of the Maryland Constitution, which provide for taking, at a general election each twenty years, "the sense of the People in regard to calling a Convention for altering this Constitution," the defendants admitted plaintiffs' allegations that a state-wide referendum on whether a constitutional convention should be called was submitted to the voters at the general election in 1950; that a majority of the voters (by vote of 200,439 to 56,998) approved the calling of a constitutional convention; and that ten bills providing for the convocation of a constitutional convention were introduced in the General Assembly between 1951 and 1958 and that the General Assembly refused to enact the necessary enabling legislation (R. 14, 48–49, 93–94).

4. *Decision of the Circuit Court for Anne Arundel County on Remand.* On May 24, 1962, Circuit Judge Duckett ruled that the apportionment of the House of Delegates invidiously discriminated against the people of Montgomery, Baltimore, and Prince George's Counties, but not against the people of Baltimore City or Anne Arundel County (R. 108); and that therefore Article III, § 5 of the Maryland Constitution, which apportions the House of Delegates, violates the equal protection clause of the Fourteenth Amendment (R. 108–110). Judge Duckett said that the apportionment of the Senate might be "constitutionally based upon area and geographical location regardless of population or eligible voters" (R. 107), but refrained from making a formal ruling.

Judge Duckett also stated that the General Assembly had the power to enact a statute providing for the reapportionment of the House of Delegates and to propose a constitutional amendment providing for reapportionment (R. 109). He retained jurisdiction in order to grant injunctive relief before the November 1962 election if it became appropriate (R. 109).

5. *The 1962 Legislation Apportioning the House of Delegates.* On May 31, 1962, the Maryland legislature enacted temporary legislation reapportioning the House of Delegates. Article 40 Maryland Code (1962 Supp.) § 42, Appendix A, pp. 92–96 below. The statute provides that the House of Delegates shall consist of 123 members, with each county and each of the

six legislative districts in Baltimore City receiving a minimum of two delegates. The remaining 65 delegates are to be apportioned by gubernatorial proclamation after each federal decennial census among the counties and legislative districts of Baltimore according to the following formula: The total population of the State shall first be divided by 65, with the quotient obtained constituting the unit of population necessary for an additional delegate. The quotient is then to be divided into the population of each county or legislative district having a population in excess of the unit of population, with each county and legislative district to receive an additional number of delegates equal to the resulting quotient, dropping any fractional remainder. If the total number of delegates is less than 123, additional delegates shall be apportioned among the counties and legislative districts having the highest fractional remainders until 123 delegates have been apportioned.

The new law also provides, however, that during the four-year term of the House of Delegates elected in November 1962, "and for any additional period during which this section may be extended," each county and legislative district should be entitled, as a minimum, to the same number of delegates as on January 1, 1962 (40 Maryland Code (1962 Supp.) § 42(e). In practice, this will mean that there will be more than 123 delegates and that the counties and legislative districts which were overrepresented under the old law will retain much of their former relative power. Indeed, the only effect of the new formulas as applied by the legislature in the statute

(thereby removing the need for a gubernatorial proclamation based upon the 1960 census) was to add seven delegates for Baltimore County, four delegates each for Prince George's and Montgomery, two for the Third District in the City of Baltimore, and one each for Anne Arundel and Baltimore's Fifth District.

Under the new legislation, Baltimore City and the Counties of Anne Arundel, Baltimore, Montgomery and Prince George's, with 75.3 percent of the State's 1960 population, elect 79 delegates or 55.6 percent of the House. This is only 6.9 percent more than the representation of Baltimore City and these counties prior to the statute. The remaining counties, with 24.7 percent of the State's population elect 44.4 percent of the House of Delegates. Counties with 35.6 percent of the population elect a majority of the House. (R. 184–185.) The following table shows the extent of the disparities as among the populous counties, the City of Baltimore, and an illustrative sampling of overpopulated counties.[4]

County (or Baltimore City)	Total population (1960)	Number of Delegates	Population per Delegate	Ratio to most under-represented county
Baltimore	492,428	13	37,879	1.60
Prince George's	357,395	10	35,740	1.05
Montgomery	340,928	10	34,093	1.11
Anne Arundel	206,634	7	29,519	1.28
Baltimore City	939,024	39	24,077	1.57
Charles	32,572	2	16,286	2.32
Cecil	48,408	3	16,136	2.34
Washington	91,219	6	15,203	2.49
Kent	15,481	2	7,741	4.80
Somerset	19,023	3	6,341	5.79
State total	3,100,699	142	21,837	1.73

[4] For sources, see p. 8, note 3 above.

The ideal or perfect representation per delegate is 21,831. Nineteen political subdivisions are below this figure while the remaining five subdivisions, all heavily urbanized, are above.

The new apportionment statute expires automatically on January 1, 1966, except that, if a constitutional amendment superseding the statute is submitted to the voters at the 1964 general election and rejected, the statute will continue in force until January 1, 1970. The statute further provides that upon its expiration the House of Delegates shall again be apportioned according to Article III, § 5 of the Constitution, which the Circuit Court has held unconstitutional.

6. *The Supplementary Decision by the Circuit Court for Anne Arundel County.* On June 28, 1962,[5] Judge Duckett held that the apportionment of the Maryland Senate under Article III, § 2 of the Maryland Constitution, did not violate the Fourteenth Amendment because an apportionment based upon area and geographical location regardless of population protected minorities, prevented hasty, although temporarily popular, legislation, and accorded with history, tradition, and reason (R. 107, 118–121). Judge Duckett placed considerable reliance upon a comparison to the United States Senate.[6]

---

[5] Following Judge Duckett's failure to rule upon the validity of the apportionment of the Senate, plaintiffs appealed and the Court of Appeals remanded for a prompt decision (R. 112).

[6] Judge Duckett stated that the plaintiffs conceded that reapportionment of the House of Delegates was proper (R.

7. The Decision of the Court of Appeals of Maryland. The Court of Appeals, by vote of 5 to 3, affirmed the decree *per curiam*, noting that it would file an opinion at a later date (R. 124). Plaintiff's motion for re-argument, which called the court's attention to recent cases and developments in the field of legislative reapportionment (R. 125–162), was denied on September 11, 1962 (R. 125).

On September 25, 1962, the court filed its opinion (R. 162–191). The court said that the appeal did not question the apportionment of the House of Delegates (R. 164). It upheld the constitutionality of the Senate apportionment upon three distinct grounds: First, the court noted that each county has since 1837 had the same number of senators except that Baltimore City has had additional representation and that Maryland counties have always possessed and maintained "distinct individualities" (R. 166). Second, the court said, one house must be apportioned on the basis of geography because the idea of a bicameral legislature assumes two different methods of apportionment in the two houses in order to check "hasty and ill-conceived legislation" (R. 167–168). Third, the court relied on the analogy of geographic representation of the Maryland Senate to the geographic representation of the States in the federal Senate on the ground that the effect upon vot-

---

114). However, while plaintiffs do not challenge the apportionment of the House as such, they do emphasize the deviations from equality in that House in challenging the apportionment of the legislature generally and the Senate in particular as discriminating against urban areas. See Brief for the Appellants, No. 29, this Term, pp. 3, 59–60.

ing rights was the same whether the voter voted for a United States Senator or a State Senator (R. 168–169).

Chief Judge Brune, Judge Prescott and Judge Marbury dissented. They pointed out that the House of Delegates, even under the new statute, was not apportioned in accordance with population, and that there were gross disparities in the Senate. After distinguishing the so-called "Federal analogy" and observing that there could be no hard and fast rule, they concluded that neither history nor "the magic phrase 'Federal analogy,'" nor the desirability of "a proper diffusion of political restraint," furnished a rational basis for such gross disparities in *per capita* representation as were found in the Maryland legislature (R. 183).

SUMMARY OF ARGUMENT

I

The equal protection clause of the Fourteenth Amendment guarantees qualified electors against arbitrary and unreasonable discrimination in the apportionment of seats in a State legislature. It is settled law that arbitrary discrimination among voters with respect to opportunities for participation in elections and other processes of government violates the Fourteenth Amendment. *Nixon* v. *Condon*, 286 U.S. 73; *Gray* v. *Sanders*, 372 U.S. 368; cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339. The prevailing opinions in *Baker* v. *Carr*, 369 U.S. 186, 204–208, 226, 247–250, 251–262, 265–266, implicitly or explicitly recognize that the same principles are applicable to leg-

islative apportionment. That has been the view of the lower courts since *Baker* v. *Carr*.

Familiar principles of constitutional adjudication under the equal protection clause provide judicially manageable standards for its application to controversies over legislative apportionment. The basic standard of comparison is the representation accorded qualified voters *per capita*. Whether there are other permissible objectives of legislative apportionment that would justify substantial deviation from *per capita* equality need not be decided in this case nor in the companion cases from Alabama, Virginia and New York. We assume *arguendo*, without prejudice to future cases, that there may be objectives of legislative apportionment that would justify inequalities, but the justification must be strong enough to make the discrimination reasonable in the light of the basic ideal of political equality. "The creation by law of favored groups of citizens and the grant to them of favored political rights is the worst of all discriminations under a democratic system of government" (Justices Black and Douglas dissenting in *South* v. *Peters*, 339 U.S. 276, 279).

Plainly, an apportionment that creates gross inequalities in *per capita* representation without rhyme or reason is arbitrary and capricious discrimination, which violates the Fourteenth Amendment. "* * * it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Baker* v. *Carr*, 369 U.S. 186, 226.

Equally plainly, the equal protection clause is violated by a discriminatory apportionment based upon criteria that are contrary to express constitutional limitations or otherwise invidious or irrelevant. An apportionment based upon race or sex would be invalid, also one based upon an invidious criterion, such as religion or national origin, or a whimsical standard, such as the first letter of each county's name or its geographical location. An apportionment serving no purpose other than that of giving bankers, farmers, trade union members or any other class or profession greater or less weight in the legislature than its numbers warrant would also violate the Fourteenth Amendment. While an apportionment which serves permissible objectives may be valid even though it happens also to favor, within limits, the voters in rural areas, it is nevertheless invalid if it serves no purpose except strengthening the rural vote. The creation of a favored class of voters with political power disproportionate to their number is not a permissible objective of legislative apportionment.

Whether there are constitutionally adequate reasons for the differences in the representation in different cities or counties, measured *per capita,* depends not only upon the character of the justification but also upon the degree of the differentiation. We are dealing with a fundamental political right expressly recognized by the founding fathers, that goes to the heart of American government. When a State deals with such a right, the equal protection clause applies

more strictly than when the subject is economic regulation. Whatever may be true in other cases, the equal protection clause is violated by an apportionment that subordinates the principle of popular representation to the representation of political subdivisions to such a degree as to create gross inequalities in the representation of voters in both houses of a State legislature and to give control of both houses to representatives elected by small minorities of the people. Whether it requires more can be left to the future.

II

Applying the foregoing principles, we submit that the present apportionment of seats in the Maryland legislature violates the Fourteenth Amendment for two reasons.

First, the present apportionment discriminates, without rhyme or reason, against the voters in Baltimore, Prince George's and Montgomery Counties. Since every county is assigned one senator regardless of population, citizens in those three heavily populated counties have less than one-sixteenth the voting power of citizens in any of the ten least populous counties. In the instant case that gross inequality cannot be justified upon the ground that Maryland's policy is to have senators represent counties rather than people, for Baltimore City is given six seats in the State Senate with the result that a voter in Baltimore City has three times the representation of a voter in Baltimore County and more

than twice the representation of voters in Prince George's and Montgomery. Every contention that can be made for geographical diffusion of voting power, for avoidance of domination by the concentrated votes of a large city, for reserving enough votes to give every locality some representation, or for avoiding excessively large districts, cuts against favoring the voters of Baltimore City over the voters of Baltimore, Prince George's and Montgomery counties. Nor can we discover any other possible justification for discriminating against the citizens of the latter counties as compared to both the urban voters in Baltimore City and the rural voters in the sparsely populated counties. The lack of uniformity apparently results from the exercise of sheer political power based upon *no* policy.

Second, as urged by Chief Judge Brune and Judges Prescott and Marbury dissenting, the apportionment of the Maryland legislature violates the equal protection clause by subordinating popular representation to the representation of political subdivisions to such a degree as to create gross inequalities among voters and give control of both houses of the legislature to representatives elected by small minorities of the people. The grave inequalities in *per capita* representation in the Maryland Senate are epitomized by the fact that there are eight counties in which the voters have at least twenty times the *per capita* representation of a voter in Baltimore County, fourteen times the representation of a voter in Montgomery County and fifteen times the repre-

sentation of a voter in Prince George's County. A majority of the Senate may be elected by as little as one-seventh of the people. The House of Delegates is also apportioned in a manner which results in substantial discrimination. The disparity between voters in the most overrepresented and most underrepresented counties runs as high as 6 to 1. Thirty-six percent of the people elect a majority of the House. The disparities favor the same voters in both branches.

If one house of a legislature is apportioned substantially in accordance with population, the Fourteenth Amendment may leave wider room for variation in the other. We assume that much for the purposes of the case, for the issue is not now before the Court. There can be no justification, however, for substantial discrimination against the same people in their *per capita* representation in both houses. The analogy that the court of appeals sought to draw from the United States Senate is inappropriate not only because of its different origin, but also because the federal House of Representatives is apportioned substantially in accordance with population. Nothing in Maryland's history vindicates the discrimination, for the inequalities have been growing steadily greater. Maryland's gross malapportionment finds no support in the practice of other States, nor in the objectives supposed to be advanced by apportioning representatives to political subdivisions as such. It therefore violates the equal protection clause of the Fourteenth Amendment.

ARGUMENT

INTRODUCTION

The present case challenging the apportionment of representatives in the Maryland legislature and related cases challenging the apportionment in Alabama, Virginia and New York[7] bring before the Court for the first time the question—what criteria are to be applied in implementing the decision in *Baker* v. *Carr*, 369 U.S. 186. Since the case comes here from a State court that took jurisdiction, there is no occasion to consider whether it might have declined to intervene in the exercise of equitable discretion[8] or, as a federal court might conceivably do, upon the ground that a matter involving interference with the political processes of the State, if relief is granted, should be referred first to the State's own courts.[9] Nor is there any question here concerning

[7] *Reynolds* v. *Sims*, Nos. 23, 27, and 41, this Term, *Davis* v. *Mann*, No. 69, this Term, and *WMCA, Inc.* v. *Simon*, No. 20, this Term. Although this brief contains a general discussion of the basic principles applicable to all four cases, the government also is filing a separate brief in each case discussing the application of the principles to its facts and dealing with any special problems.

[8] In a case litigated in a State court, the question of equitable discretion is a State question which is not reviewable in this Court. On the other hand, such a question in a federal court is, of course, a federal question. Such an issue is before this Court in *Wesberry* v. *Sanders*, No. 22, this Term, where the federal district court dismissed a suit challenging Congressional districting in Georgia for want of equity. See our brief in *Wesberry* v. *Sanders*, No. 22, This Term, pp. 36–42.

[9] This issue is involved in *Davis* v. *Mann*, No. 69, this Term, and will be discussed in our brief in that case.

the form of relief to be fashioned by the Maryland courts.

We lay entirely to one side all questions concerning gerrymandering. Whatever constitutional claims can be raised against drawing the boundary lines of electoral districts so as to increase the legislative power of a party or other political group or to affect the weight of voters of identifiable views in electing representatives, the claim is very different from the assertion of a right to have the same degree of representation as other citizens once the districts have been chosen.

In terms of policy, an apportionment of representation in a legislative body in a manner that gives the people of some areas greater representation *per capita* than others is an unwarranted departure from the democratic ideals of equality and majority rule. Whatever justification the origins of political institutions, the scattered character of settlements, difficulties of travel and communications and the coherence of local communities may once have afforded for other bases of representation, there is scant reason today for any substantial deviation from the principle that representation should be proportionate to population. *One Man—One Vote, A Statement of Basic Principles of Legislative Apportionment* (Twentieth Century Fund, 1962), pp. 4–5. See also Kennedy, *The Shame of the States*, N.Y. Times Magazine, May 18, 1958, pp. 12, 37; United States Commission on Intergovernmental Relations, *Report to the President* (1955), pp. 38–40; United States Advisory Commission on In-

tergovernmental Relations, *Report: Apportionment of State Legislatures* (1962), pp. 67–73; Key, *American State Politics: An Introduction* (1956), pp. 60–63, 75–76; Strout, *The Next Election is Already Rigged,* Harper's (November 1959), reprinted at 106 Cong. Rec. A 519–521; Baker, *Rural versus Urban Political Power* (1955).[10]

We are not unmindful, however, that throughout our constitutional history many States, both in adopting their fundamental constitutional charters and in practice, have chosen bases of apportionment for one house and occasionally both houses of the legislature, such as the representation of political subdivisions, which produce results varying from equality of representation *per capita.* Whether the practical operation of those provisions was formerly so different from what it is today and whether the changes in facilities of communications and transportation as well as social and economic conditions have destroyed whatever justification the variances once had, are questions that need not be decided here. The settled principle that the Court will not go farther in deciding questions of constitutional law than required by the record before it carries added wisdom in dealing with such novel and difficult problems as legislative apportionment. Each of the four apportionment cases at bar can be decided without ruling upon whether the Fourteenth Amendment always requires substantially equal rep-

[10] For a bibliography of the issues involved in this case, see *Selected Bibliography on Legislative Apportionment and Districting* (Silva and Boyd ed., National Municipal League, 1963).

resentation *per capita* in both houses of a State legislature. For even if there are permissible objectives of legislative apportionment which would justify some departure from equal representation *per capita*, the discrimination in each of these four cases must be held so arbitrary and capricious as to deny the victims equal protection of the laws. Thus, the Court can decide these cases while leaving the broader issue to a later day.

We follow the same course. Our analysis of the application of the Fourteenth Amendment to controversies over legislative apportionment sustains the constitutional claims of the complainants yet it is wholly consistent with the view that the Fourteenth Amendment leaves room for accommodating, within reasonable limits, the principle of equal representation and other permissible objectives. We assume that view throughout our briefs. Since it would be redundant to reiterate the qualification on every relevant occasion, we emphasize now that the assumption is made *arguendo*, reserving further judgment until the issues are presented.

In this brief we argue first, that the guarantees of the Fourteenth Amendment are applicable to the apportionment of representatives in a legislature—a question technically left open in *Baker* v. *Carr*—and in the course of that discussion we submit what we believe to be the controlling standards, indicating their application to all four apportionment cases before the Court to the extent necessary to present a compendious approach to the implementation of *Baker* v. *Carr*.

706-577—63——3

The other half of our Argument deals specifically with the present case. We submit that the Maryland apportionment denies petitioners the equal protection of the law, first, because it discriminates without rhyme or reason between the people of Baltimore City, on the one hand, and the people of Baltimore, Prince George's and Montgomery Counties, on the other; second, because it grants rural counties such heavy overrepresentation in both branches of the legislature as to submerge the principles of popular representation and majority rule.

I

THE EQUAL PROTECTION CLAUSE GUARANTEES QUALIFIED VOTERS AGAINST ARBITRARY AND UNREASONABLE DISCRIMINATION IN THE APPORTIONMENT OF SEATS IN A STATE LEGISLATURE

Although *Baker* v. *Carr*, 369 U.S. 186, left open the question whether the equal protection clause imposes any substantive limitations upon the power of a State to dilute the value of the franchise of some voters as opposed to others by arbitrary and unreasonable discrimination in the apportionment of seats in a State legislature, the State and lower federal courts unanimously agree that such an apportionment violates the Fourteenth Amendment. *Baker* v. *Carr*, 206 F. Supp. 341 (M.D. Tenn.) (after remand by this Court); *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala.), pending on appeal *sub nom. Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term; *Lisco* v. *McNichols*, 208 F. Supp. 471 (D. Colo.); *Sobel* v. *Adams*, 208 F. Supp. 316, supplemental opinions, 208 F. Supp. 319, 214 F. Supp.

811 (S.D. Fla.); *Thigpen* v. *Meyers,* 211 F. Supp. 826 (W.D. Wash.), pending on appeal, No. 381, this Term; *Toombs* v. *Fortson,* 205 F. Supp. 248, 254, and unreported opinion, September 5, 1962 (N.D. Ga.); *WMCA, Inc.* v. *Simon,* 208 F. Supp. 368 (S.D.N.Y.), pending on appeal, No. 20, this Term; *Moss* v. *Burkhart,* 207 F. Supp. 885, and unreported opinion, July 17, 1963 (W.D. Okla.); *Mann* v. *Davis,* 213 F. Supp. 577 (E.D. Va.), pending on appeal, No. 69, this Term; *Wisconsin* v. *Zimmerman,* 209 F. Supp. 183 (W.D. Wis.); *League of Nebraska Municipalities* v. *Marsh,* 209 F. Supp. 189 (D. Neb.); *Sincock* v. *Duffy,* 215 F. Supp. 169 (D. Del.), pending on appeal, No. 307, this Term; *Davis* v. *Synhorst,* 217 F. Supp. 492 (S.D. Iowa); *Nolan* v. *Rhodes,* U.S.D.C., S.D. Ohio, decided June 12, 1963; *Caesar* v. *Williams,* 371 P. 2d 241 (Idaho Sup. Ct.), petition for rehearing denied, 371 P. 2d 255; *Maryland Committee for Fair Representation* v. *Tawes,* 228 Md. 412, 180 A. 2d 656; *Maryland Committee for Fair Representation* v. *Tawes,* Circuit Court, Anne Arundel County, Maryland, decided May 24, 1962, supplemental opinion June 28, 1962, affirmed, 229 Md. 406, 184 A. 2d 715, pending on appeal, No. 29, this Term; *Scholle* v. *Secretary of State,* 367 Mich. 176, 116 N.W. 2d 350 (opinions of Justices Kavanagh and Souris), pending an appeal *sub nom. Beadle* v. *Scholle,* No. 24, this Term; *Levitt* v. *Maynard,* 104 N.H. 243, 182 A. 2d 897; *Sweeney* v. *Notte,* 183 A. 2d 296 (R.I. Sup. Ct.); *Harris* v. *Shanahan,* District Court, Shawnee County, Kansas, opinions of May 31, 1962, and July 26, 1962; *Fortner* v. *Barnett,* No. 59,965, Chancery Court, First Judicial District of Hinds County, Mississippi; *Fishman*

v. *White*, Superior Court, Suffolk County, Massachusetts, decided March 27, 1963; *Jackman* v. *Bodine*, 78 N.J. Super. 414, 188 A. 2d 642. See also *Asbury Park Press, Inc.* v. *Woolley*, 33 N.J. 1, 161 A. 2d 705, 710.

We submit that this widespread acceptance of the view that the Fourteenth Amendment has substantive content as applied to legislative apportionment is plainly correct.

A. THE FOURTEENTH AMENDMENT SECURES EQUALITY OF OPPORTUNITY UNDER LAW FOR PARTICIPATION IN THE PROCESS OF SELF-GOVERNMENT

It has long been settled law that arbitrary discrimination among voters with respect to participation in primary elections or other governmental processes violates the equal protection clause. *E.g.*, *Nixon* v. *Condon*, 286 U.S. 73; *Nixon* v. *Herndon*, 273 U.S. 536; cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339. *Gray* v. *Sanders*, 372 U.S. 368, squarely holds that there is a constitutional right to freedom from inequality in the weighting of votes as well as in the opportunity to cast ballots. There is no relevant difference, from the standpoint of the fundamental right at stake, between undue discrimination diluting a qualified voter's influence in election of a governor and undue discrimination diluting his influence in the legislature of a representative government, even though the standards of "undue" differentiation may be quite different because different considerations are relevant in apportioning representatives than in counting votes within a single constituency.

The opinion of the Court in *Baker* v. *Carr* and the dissenting opinion of Mr. Justice Frankfurter both

assume that some kinds of discrimination in an apportionment may be so invidious or unjust as to violate the Fourteenth Amendment. See 369 U.S. at 226 and 300. The concurring opinion of Mr. Justice Clark rests upon that proposition. *Id.* at 251. Mr. Justice Douglas also concluded that if the plaintiffs proved their allegations there was a violation of the Fourteenth Amendment. *Id.* at 245. Once the point is acknowledged, the only remaining question is what standards shall apply in adjudicating claims of unconstitutional discrimination.

B. FAMILIAR PRINCIPLES OF CONSTITUTIONAL ADJUDICATION UNDER THE EQUAL PROTECTION CLAUSE PROVIDE JUDICIALLY MANAGEABLE STANDARDS FOR ITS APPLICATION TO CONTROVERSIES OVER LEGISLATIVE APPORTIONMENT

1. The basic standard of comparison is the representation accorded qualified voters per capita

The starting point in adjudicating the constitutionality of an apportionment of representatives in a State legislature when attacked under the equal protection clause should be *per capita* equality of representation.[11] This standard of comparison is required

[11] "*Per capita* equality of representation" in our view may be measured either by voters or total population. In a few areas the number of aliens may be large enough to be significant, but that is seldom true. Furthermore, neither choice could be condemned as arbitrary or capricious.

By equality we mean only substantial equality disregarding those variations that the practicalities of any apportionment and of the electoral process make inevitable. See *Ragland* v. *Anderson*, 125 Ky. 141, 158, 100 S.W. 865, 869, where the court spoke of "that equality in the representation of the State which an ordinary knowledge of the population and a sense of common justice would suggest."

by fundamental ideals of American political life—the principles of equality and majority rule. "The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing—one person, one vote." *Gray* v. *Sanders*, 372 U.S. 368, 381. Jefferson, Madison and other founding fathers firmly believed that fundamental fairness required that both houses of State legislatures be apportioned solely on the basis of population, as shown by their speeches at the constitutional and the ratifying conventions, as well as by their other writings. See pp. 61–64 below. The extent to which this right of equal representation is ingrained in our constitutional system is evidenced by the fact that even before *Baker* v. *Carr*,[12] all but four of the State constitutions (or statutes in States with no apportionment provisions in their constitutions) made apportionment according to population or voters as the sole, or at least an important, principle for choosing at least one branch of the State legislature.[13] Eleven States provided for apportionment in both houses entirely in proportion to population or voters.[14] Another nine appor-

[12] The figures in this paragraph are based on State constitutions and statutes as they were published in the various State codes as of September 1961. Changes in these provisions subsequent to *Baker* v. *Carr* reflect in large part court orders or the threat of court orders.

[13] The exceptions were Delaware, Maryland, Mississippi and Virginia.

[14] Colorado, Indiana, Massachusetts, Minnesota, Nebraska (unicameral), Oregon, South Dakota, Tennessee, Washington, West Virginia and Wisconsin.

tioned one house in this manner and in the other based the apportionment upon population, except that each county or town was guaranteed at least one seat or there was some other such limitation.[15] Three apportioned one house by population although population was not recognized in apportioning the other house.[16] Eleven States provided for the apportionment of both houses on the basis of a standard including population but placed some limitation on this principle in both houses.[17] And twelve States, although they provided other bases for choosing representatives in one branch, called for apportionment of the other according to population with the stipulation that each county or town should have at least one seat or with some other limitation.[18] In evaluating the limitations it must also be kept in mind that the guarantees of one representative to each county or town would not formerly have created inequities in *per capita* representation of the same order of magnitude as they often create today. See, *e.g.*, pp. 82–83 below; I David and Eisenberg, *Devaluation of the Urban and Suburban Vote: A Statistical Investigation of Long-term Trends in State Legislative Representation* (University of Virginia, 1961), p. 9.

The principle is also reflected in the decisions of

---

[15] Alaska, Kansas, Kentucky, Missouri, Montana, North Carolina, Ohio, Oklahoma and Utah.

[16] California, New Hampshire and Illinois.

[17] Alabama, Connecticut, Florida, Iowa, Maine, New Mexico, New York, Pennsylvania, Rhode Island, Texas and Wyoming.

[18] Arizona, Arkansas, Georgia, Hawaii, Idaho, Louisiana, Michigan, Nevada, New Jersey, North Dakota, South Carolina and Vermont.

this Court. In *Gray* v. *Sanders*, the Court said (372 U.S. 368, 379–380):

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

The decision emphasizes the degree to which equality of right in participation in representative government is a fundamental principle of the political philosophy embodied in American institutions and safeguarded by the Fourteenth Amendment.

The right to equal treatment in choosing a legislature cannot be less than the right in the choice of a governor. This is not to say that the issues here and in *Gray* v. *Sanders* are the same.[19] The law is concerned with the adjustment of conflicting rights, and there may be matters of legitimate concern in the apportionment of representatives which are not involved in giving effect to the votes within

[19] The distinction was emphasized in the opinion of the Court (372 U.S. at 378) and the concurring opinion of Mr. Justice Stewart (joined by Mr. Justice Clark) (*id.* at 381–382).

a single constituency. Nevertheless, the "creation by law of favored groups of citizens and the grant to them of preferred political rights is the worst of all discriminations under a democratic system of government." *South* v. *Peters*, 339 U.S. 276, 279 (Justices Black and Douglas dissenting). Once it appears that persons similarly circumstanced have been denied equality of representation *per capita*, the apportionment stands condemned unless the differentiation has a relevant and substantial justification.

The usual standard for judging the constitutionality of legislative classifications is whether the differentiation is arbitrary and unreasonable. *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78–79; *McGowan* v. *Maryland*, 366 U.S. 420, 425–426; *Phillips Chemical Co.* v. *Dumas School District*, 361 U.S. 376, 385; *Morey* v. *Doud*, 354 U.S. 457, 463–464. "The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law." *Goesaert* v. *Cleary*, 335 U.S. 464, 466.

Whether a distinction is "reasonable" necessarily depends both upon the kind and degree of the inequality and upon the existence and importance of the justification, *i.e.*, the aims of the legislation. Greater justification is necessary to support discrimination in matters of political right than in taxation or economic regulation. See pp. 65–69 below. Furthermore, a State policy that would justify minor inequalities in representation *per capita* may be so inadequate in comparison with grosser inequalities

as to leave the discrimination arbitrary and capricious. In principle, therefore, the Court must always examine both pans of the scale and every case must be tested by the one ultimate question whether the actual discrimination against the *per capita* representation of the complaining class of voters has a rational basis in the objectives the apportionment law is designed to achieve. It seems helpful, however, to particularize some specific applications of the general test.

2. The equal protection clause is violated by an apportionment that creates gross inequalities in representation without rhyme or reason

This proposition asserts no more than that when a State discriminates in the representation accorded the voters in different districts for no reason whatsoever the discrimination violates the equal protection clause. One would suppose that such cases would be only imaginary but experience shows that gross inequalities often develop in the apportionment of a legislature without any intelligible foundation. Some stem from shifts in the distribution of population combined with the unwillingness of the controlling majority to surrender a measure of its power by reapportioning the legislature in accordance with the mandate of the State's own constitution. Other instances suggest that arbitrary and capricious discrimination sometimes results from current use of sheer political power without any logic or policy except the perpetuation of political control.

Cases in this Court offer dramatic illustrations. Mr. Justice Clark's opinion in *Baker* v. *Carr* demonstrates that Tennessee's apportionment was "a crazy

quilt without rational basis." 369 U.S. at 254. The opinion of the district court upon remand invalidated a new apportionment of the Senate upon the same reasoning. *Baker* v. *Carr,* 206 F. Supp. 341, 346–348 (M.D. Tenn.).

The preexisting apportionment in the Alabama cases now before the Court [20] affords another illustration of gross and capricious discrimination allowed to develop in plain disregard of the State's own Constitution. In the House we disregard the divergencies attributable to the State's constitutional requirement that each county have one representative; whatever its validity (see pp. 46–50 below), that is not an irrational distribution based upon *no* policy. The crazy-quilt appears in the distribution of the remaining seats. Barbour County with 12,350 people has two representatives in the lower house while Baldwin County with 49,088 has only one; in other words a vote in Barbour County counts eight times a vote in Baldwin County. In Hale County with two seats there are 19,547 people, one representative for each 9,769. In Mobile County with three seats there are 314,301 people, one representative for each 104,767. These are not a few freak situations. Applying Alabama's own Constitution, one finds that of the 30 counties with more than one seat, 15 are overrepresented and six are underrepresented; thus the vice affects 70 percent. Not only are the inequalities great,

[20] *Reynolds* v. *Sims,* Nos. 23, 27, 41. The cases involve four apportionments: the apportionment in force when the action was instituted, which we shall call the "preexisting apportionment"; the proposed constitutional amendment; the Crawford-Webb Act; and the apportionment ordered by the district court.

but they result in giving control of the House to counties having only 25.7 percent of the total population. In our separate brief in the Alabama cases we shall show the wholly capricious inequalities in the preexisting Alabama apportionment in full detail and demonstrate that they extend to the Senate. We cite them here only to illustrate the application to apportionment of the familiar constitutional principle that State action is invalid if it involves discrimination that reflects no policy, but simply arbitrary and capricious action.

The Virginia apportionment held invalid in *Davis* v. *Mann*, now pending on appeal, No. 69, this Term, was adopted in 1962 and cannot be ascribed to the passage of time and legislative indifference, but we submit that it too is either a crazy-quilt or else an instance of hostile discrimination against the people of Arlington and Fairfax Counties and the City of Norfolk. The following tables give a quick summary of the inequalities, which will be discussed at more length in our brief in *Davis* v. *Mann*:

ASSEMBLY

District	Population (1960)	Seats	Population per seat	Percent of ideal ratio
Arlington	163,401	3	54,467	73
Fairfax, et al	285,194	3	95,064	42
Norfolk City	305,872	6	50,978	73
Loudoun	24,549	1	24,549	182
Petersburg City, et al	58,023	2	29,466	135

SENATE

Arlington	163,401	1	163,401	61
Fairfax, et al	285,194	2	142,597	70
Norfolk City	305,872	2	152,936	65
Loudoun, et al	63,703	1	63,703	156
Petersburg City, et al	74,074	1	74,074	134

The only explanation offered by appellees is that large numbers of men in the armed forces live in Arlington, Fairfax and Norfolk. The district court rejected this theory as factually inadequate, and its sufficiency, either in fact or law, will doubtless be an issue in the Virginia case.

The instant case arising from Maryland is quite similar in principle, although the alleged justification has not been advanced. As we show later in more detail (pp. 50–57 below), even if Maryland were free to apportion her Senate by counties without regard to population, the present apportionment would be invalid because it results in arbitrary discrimination between the people of Prince George's, Montgomery and Baltimore Counties, on the one hand, and the rural counties and the City of Baltimore, on the other. Each of the 23 counties has one seat, but Baltimore City which is an entirely separate political subdivision is given six additional seats, one for each of six legislative districts. Thus, the voters of Baltimore City have one senator for every 156,504 people, but the voters in Baltimore County have only one for a population of 492,428; the discrimination is in the ratio of 3 to 1. There is similar discrimination in favor of Baltimore City against Prince George's and Montgomery Counties each of which has a single senator for approximately 350,000 people against the one senator for each 156,504 people in Baltimore City. The voters of the ten least populous counties have, on the average, almost fifteen times the representation *per capita* of the people of Prince George's and Mont-

gomery Counties. While representation of historical political subdivisions having an identity and significance of their own might be, within limits, a permissible basis of representation under some circumstances and may be blended with representation by population in order to temper any injustice to the people of populous areas, it is arbitrary and capricious to discriminate without rhyme or reason against the people of some populous areas in favor of both rural areas and other populous areas.

By way of contrast and limitation we should point out that several of the apportionments challenged in the pending cases cannot be classed as "crazy-quilt," whatever may be their validity or invalidity from other points of view. Alabama's proposed constitutional amendment would distribute the Senate seats one to each county, and the seats in the lower house one to each county with the remaining seats according to population. New York makes the latter allocation in the lower house. The current Maryland statute applies the same principle except that each county was guaranteed against a reduction of its former representation. In each of these instances the apportionment follows some rule.

At this juncture we refer to the facts of the specific cases before the Court only as part of our effort to show compendiously how familiar principles of constitutional law provide standards for the adjudication of controversies over legislative apportionment. The soundness of the standard here invoked—that the equal protection clause is violated by an apportionment that works gross inequalities in representation without rhyme or reason—scarcely requires argu-

ment. As the Court said in *Baker* v. *Carr*, *supra*, 369 U.S. at 226—

> it has been open to the courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.

The principle has been applied in a host of lower court decisions following *Baker* v. *Carr*. *Baker* v. *Carr*, 206 F. Supp. 341, 346–348 (M.D. Tenn.); *Toombs* v. *Fortson*, 205 F. Supp. 248, 254–255, 256 (N.D. Ga.); *Sobel* v. *Adams*, 208 F. Supp. 316, 323–324 (S.D. Fla.); *Thigpen* v. *Meyers*, 211 F. Supp. 826, 831 (W.D. Wash.), pending on appeal, No. 381, this Term; *Sincock* v. *Duffy*, 215 F. Supp. 169, 184 (D. Del.), pending on appeal *sub nom. Roman* v. *Sincock*, No. 307, this Term; *Mann* v. *Davis*, 213 F. Supp. 577, 584 (E.D. Va.), pending on appeal, No. 69, this Term; *Moss* v. *Burkhart*, U.S.D.C., W.D. Okla., decided July 17, 1963; *Sweeney* v. *Notte*, 183 A. 2d 296, 305 (R.I. Sup. Ct.) (Justice Roberts concurring); *Jackman* v. *Bodine*, 78 N.J. Super. 414, 188 A. 2d 642; see *Wesberry* v. *Vandiver*, 206 F. Supp. 276, 282 (N.D. Ga.), pending on appeal, No. 22, this Term (involving Congressional districting).

3. The equal protection clause is violated by a discriminatory apportionment based upon criteria which are contrary to express constitutional limitations or otherwise invidious or irrelevant

Although a *prima facie* demonstration that an apportionment is a crazy-quilt is enough to condemn it under the Fourteenth Amendment (unless and until this showing is rebutted), an apportionment is not

constitutional merely because it conforms to some criterion capable of verbal articulation. To put an extreme case, the equal protection clause would condemn an apportionment that systematically, but without other reason, gave each county whose name began with a letter in the first half of the alphabet four representatives and the other counties three. "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." *Skinner* v. *Oklahoma,* 316 U.S. 535, 542.

Gomillion v. *Lightfoot,* 364 U.S. 339, although a case involving participation in municipal government, suggests another clear example of an unconstitutional apportionment based upon a systematic rule: if a State apportioned its representatives in a manner that systematically discriminated against areas containing a large Negro population—for example, by apportioning representatives in the ratio of the white population of each county to the total number of whites—the apportionment would violate the Fourteenth and probably the Fifteenth Amendments. Discrimination based upon sex would result in few inequalities, because the distribution of women today conforms rather closely to the pattern of population, but if serious inequalities should result, that apportionment would violate the Fourteenth and perhaps the Nineteenth Amendments.

The principle is not limited to discriminations that are shown invidious by an explicit constitutional limitation. It would be just as impermissible to deny

equal representation on the basis of national origin, religion or political philosophy. Although these differentiations are logically intelligible, they are both invidious and irrelevant to any tolerable purpose of governmental organization; they violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert* v. *Louisiana*, 272 U.S. 312, 316.

An apportionment serving no purpose other than that of giving bankers, farmers, trade union members or any other class or profession greater or less weight in the legislature than other citizens would also violate the guaranty of equal protection. In *Gray* v. *Sanders*, 372 U.S. 368, 379, the Court held that all who participate in an election are to have an equal vote—whatever their occupation, whatever their income, or wherever their home may be within the area for which the election is held. There is no greater reason to attribute extra virtue or grant added power to voters of a particular occupation, economic status or place of residence in the apportionment of a State legislature. A rural voter is not entitled, by reason of that fact alone, to have greater or less representation than an urban resident.

This is not to argue that *Gray* v. *Sanders* governs all aspects of controversies over inequalities in representation. One difference is that an inequality in representation may perhaps be justified (if it held within tolerable limits) by a legitimate objective of legislative apportionment that can only be satisfied by some sacrifice of the principle of *per capita*

equality. The second difference, which follows from the first, is that an apportionment which has a *bona fide* constitutional justification is not invalid *merely* because it also results, if measured by the number of people represented by each seat, in classifications more or less corresponding to economic, occupational or geographic groups.

For example, if an apportionment gave the voters in the western half of a State more representatives *per capita* in the Senate than voters in the eastern half for no discoverable reason other than that they lived nearer the setting sun, the discrimination would be condemned by the equal protection clause as based upon utterly irrelevant criteria. On the other hand, if it appeared that every county had two senators because the State's policy was to have counties represented as communities with interests and coherence of their own regardless of the number of voters in each, the coincidence between geographical location and the differences in representation *per capita* would not be enough automatically to invalidate the apportionment as arbitrary discrimination, and one would have to go on to inquire whether it was reasonable or unreasonable in the light of its history and objectives (see pp. 44–50 below). The coincidence between geography and relative density of population would make it convenient and for some purposes accurate, to say of the example that voters in the eastern part of the State were the victims of adverse classification but geography would not be the cause or basis thereof, and the apportionment would not be condemned by either of the rules thus far discussed.

WMCA, Inc. v. *Simon,* No. 20, this Term, in our view, presents an instance of discrimination in the degree of representation accorded different groups of qualified voters on the basis of utterly irrelevant, if not invidious, criteria. Although the apportionment of the New York Assembly, being based partly upon the principle of representation by political subdivisions, cannot be challenged on that ground, seats in the Senate are systematically divided in such a way that the *per capita* representation of voters living in any county with more than 6 percent of the State's population is limited by New York's apportionment formula to about 60 percent of the *per capita* representation of voters in less populous counties. We shall show in our brief in the *WMCA* case that the differentiation serves no function in New York except to preserve minority rule by arbitrarily enhancing the political power of voters living in counties which have less than 6 percent of the State's population. The creation of a politically favored class of voters with power disproportionate to their number is not a permissible objective of legislative apportionment; the discrimination, lacking in relevant objective, is arbitrary and capricious; and the provisions of the State constitution providing for such discrimination thereby deny the complainants equal protection of the laws.

Various bases of apportionment have been used, or might be suggested, that are neither invidious nor whimsical but nevertheless create inequalities among voters when measured by the principle of *per capita*

equality. New Hampshire, for example, provides for popular representation in the lower house but tempers this with an apportionment of Senate seats in the ratio of direct taxes paid. N.H. Const., Pt. 2, Art. 26th. In such cases familiar constitutional principles call for two inquiries:

(i) Is the differentiation based upon criteria relevant for the purposes of governmental organization or the electoral process? Objectives that are material in other contexts may be irrelevant for the purposes of representation. Farmers and bankers need not be taxed alike but the occupational difference is irrelevant to the problems of governmental organization. Thus, in *Skinner* v. *Oklahoma,* 316 U.S. 535, the Court held that the distinctions between larceny and embezzlement that are constitutional for the purposes of ordinary criminal law deny equal protection under legislation providing for the sterilization of habitual offenders and designed to prevent the transmission of their criminal proclivities.

(ii) Is the alleged objective one that a State may reasonably deem adequate to justify the inequalities actually resulting, taking into account the primacy of the principles of voter equality and majority rule? Whether there are constitutionally adequate reasons for the differences in the representation accorded the people of different counties, measured *per capita,* depends not only upon the character of the proferred justification but also upon the degree of the differences. Circumstances or objectives that might, under our basic assumption, furnish a reasonable basis for

small inequalities may be utterly inadequate, even whimsical, when offered as support for grosser discrimination.

In suggesting this inquiry we are not unmindful of the limits of the judicial function. The Court is not to exercise the legislative function of choosing between alternatives; still greater deference may be due the people of a State when exercising the sovereign function of shaping their own governmental institutions. The postulates of federalism also argue that in this area the national judiciary must take care to allow full scope for local self-government.

Yet we deal with fundamental political rights that go to the heart of American government. The Court has always applied the equal protection clause more strictly in dealing with political and human rights than in passing upon economic legislation. See pp. 65–69 below. In the final analysis, therefore, there is no escape from the ultimate question whether the State's objective is a constitutional justification for the inequalities it has created in its law.

It is unnecessary to canvass all the actual and potential bases for deviating from the principle of apportionment in direct ratio to the distribution of population. The principal conflicting policy asserted by the States in the cases at bar is that of granting representation by established political subdivision, an historic practice in the United States that may be claimed to assure a voice to scattered interests that would otherwise go unrepresented and also to have values of its own. In next suggesting the rule ap-

plicable to these cases, however, we illustrate what we believe to be the manner in which settled principles of constitutional law require one to analyze other apparently rational and non-invidious bases of apportionment.

4. The equal protection clause is violated by an apportionment which subordinates the principle of popular representation to the representation of political subdivisions to such a degree as to create gross inequalities in the representation of voters and give control of the legislature to small minorities of the people

Recognition of political subdivisions in the apportionment of representatives has a long history in American political institutions. The United States Senate is made up of two representatives of each of the States.[21] Twenty-eight State constitutions still guarantee each unit at least one representative in one or both branches of the legislature,[22] including eight which attach enough weight to the county or town as a unit to guarantee the subdivisions equal representation in one house regardless of size.[23]

Quite apart from constitutional history, we assume that political subdivisions have a claim to recognition

---

[21] In giving this illustration we do not imply that the Congress and State legislatures are properly to be compared. See pp. 73–84 below.

[22] One house: Alabama, Arkansas, Georgia, Iowa, Kansas, Louisiana, Maine, Maryland, Mississippi, Missouri, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Utah. Both houses: Arizona, Connecticut, Delaware, Hawaii, Idaho, Nevada, New Jersey, New Mexico, Rhode Island, South Carolina, Vermont, Wyoming.

[23] Arizona, Idaho, Maryland, Nevada, New Jersey, New Mexico, South Carolina, Vermont. Montana provides for equal representation by statute. Maryland departs from this rule to the extent of giving Baltimore City six senators.

in the apportionment of representatives. Their representation as units may be a *bona fide* method of ensuring that representation is sufficiently diffused to prevent leaving particular interests or areas without a voice in the legislature. Historic political subdivisions with other governmental functions come to have a coherence, unity of interest and sense of identity. In a State where representation has historically been based upon such units, these characteristics may mean that, to a considerable degree, the representative goes to the legislature to express the opinion formed by the county or town after community discussion.[24]

When one house of a bicameral legislature is apportioned substantially according to population, the Fourteenth Amendment may leave considerable room in the other house for recognition of conflicting objectives. We assume as much *arguendo*, reserving judgment until the questions are presented.[25] Nevertheless, the desire to accord political subdivisions recognition as such will not support virtually submerging the principles of voter equality and majority rule by excluding them from all consideration in one branch and subordinating them in the other. In Maryland, as a result of the apportionment of equal

---

[24] The practice of giving some recognition to political subdivisions with independent significance, coherence and sense of identity must be sharply distinguished, however, from the creation of new legislative districts (such as Michigan's former Senate districts) that serve no purpose except to assign representatives to artificial geographical areas without regard to population. See *Scholle* v. *Secretary of State*, 367 Mich. 176, 116 N.W. 2d 350, pending on appeal *sub nom. Beadle* v. *Scholle*, No. 24, this Term.

[25] See pp. 24–25 above.

votes to each county (with additional senators for Baltimore City), one-seventh of the people of Maryland elect a majority in the State Senate. The voters in the least populous county have 32 times the *per capita* representation of the most populous. In the ten least populous counties a senator represents, on the average 21,493 voters, while the senator from Montgomery County represents 340,928 voters, and the senator from Prince George's represents 357,395—ratios close to 15 to 1. Furthermore, the lower house is not apportioned by population. Thirty-six percent of the people elect a majority of the House; the disparity between the most overrepresented and most underrepresented runs as high as 6 to 1. Needless to say the discrimination runs in favor of the same rural areas in both houses, so that the imbalances tend to reinforce, not counteract each other. We submit that such gross inequality is manifestly unconstitutional.

In the Alabama case the apportionments provided in the proposed constitutional amendment and the standby Crawford-Webb Act suffer from the same defects. Senators from counties with less than 20 percent of the State's population would compose a majority of the Senate and representatives from counties with hardly more than forty percent of the population—42.1 percent—would control the lower house. Voters in each of the least populous counties would have five times the representation of the voters of Jefferson County in the lower house and more than fifty times their representation in the Senate.

Since these are major issues in the pending cases, we discuss the point here only enough to outline the argument.[26] In our view the principles of voter equality and majority rule are too vital a part of our constitutional philosophy to permit States thus to submerge them in the interest of recognizing political subdivisions. Constitutional history gives little support for such a practice. Even though the same formal rules are found in early State constitutions, they did not then create the grave injustices, gross inequalities and the rule by small minorities they sometimes yield today. Nor were the disparities which then existed within the several States regarded by the Founding Fathers as inherently desirable or worthy of preservation.[27] In addition, the conditions that gave rise to the practice of representation in State legislatures by political subdivision have largely changed and the justifications have diminished. Even if the objectives be relevant and permissible within limits, the discrimination resulting in the case of the Maryland and Alabama legislatures is so gross as to be arbitrary and capricious.

On this point the New York case is closer, but we believe that even if the apportionment of the State Senate is not invalid because of the discrimination based upon irrelevant if not invidious criteria, nevertheless the inequalities in *per capita* representation in both houses of the legislature are too great to be supported by the only available justifications.

---

[26] For full discussion in the context of the Maryland apportionment, see pp. 57–90 below.

[27] See pp. 62–65 below.

See Brief for the United States in *WMCA, Inc.* v. *Simon*, No. 20, this Term, pp. 32–37.

II

THE PRESENT APPORTIONMENT OF THE MARYLAND LEGISLATURE DENIES PETITIONERS EQUAL PROTECTION OF THE LAWS

A. THE APPORTIONMENT OF THE MARYLAND SENATE DISCRIMINATES WITHOUT RHYME OR REASON IN FAVOR OF VOTERS IN BOTH THE RURAL COUNTIES AND BALTIMORE CITY AGAINST VOTERS IN BALTIMORE, PRINCE GEORGE'S AND MONTGOMERY COUNTIES

The equal protection clause condemns an apportionment that discriminates in the representation accorded different groups of citizens in a State legislature without rhyme or reason. This proposition rests upon two settled principles: (1) "The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law (*Goesaert* v. *Cleary*, 335 U.S. 464, 466); and (2) the Fourteenth Amendment applies to the apportionment of representatives (Point I, pp. 26–50 above). If there is substantial discrimination in voting power as among citizens, the equal protection clause is violated unless the discrimination can be justified by some permissible objective of State policy. *Baker* v. *Carr*, 206 F. Supp. 341 (M.D. Tenn.) (after remand by this Court); *Sims* v. *Frink*, 208 F. Supp. 431, 439–440 (M.D. Ala.), pending on appeal *sub nom. Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term; *Mann* v. *Davis*, 213 F. Supp. 577, 580 (E.D. Va.), pending on appeal, No. 69, this Term; *Davis* v. *Synhorst*, 217 F. Supp. 492,

499, 501 (S.D. Iowa); *Moss* v. *Burkhart*, 207 F. Supp. 885, 893, 898, and unreported opinion, July 17, 1963 (W.D. Okla.); *Thigpen* v. *Meyers*, 211 F. Supp. 826, 831–832 (W.D. Wash.), pending on appeal, No. 381, this Term; *Sincock* v. *Duffy*, 215 F. Supp. 169, 184–185, 188, 189–191 (D. Del.), pending on appeal, No. 307, this Term; *Lisco* v. *McNichols*, 208 F. Supp. 471, 477–478 (D. Colo.); *Toombs* v. *Fortson*, 205 F. Supp. 248, 256 (N.D. Ga.); *Scholle* v. *Secretary of State*, 367 Mich. 176, 116 N.W. 2d 350, pending on appeal *sub nom. Beadle* v. *Scholle*, No. 24, this Term; *Sweeney* v. *Notte*, 183 A. 2d 296, 303, 305–306 (R.I. Sup. Ct.).

It cannot be denied that the apportionment of one senator to each Maryland county and to each of the six election districts in the City of Baltimore creates gross disparities in the voting power of different citizens, measured *per capita*. Kent County, the most overrepresented, has one senator for 15,481 people. Baltimore County, the most underrepresented, has one senator for 492,428 people.[28] The disparity is in the ratio of 32 to 1. Taking the ten least populous of Maryland's 23 counties, each of their senators represents, on the average, 21,493 people, while the senator from Montgomery County represents 340,928 people and the senator from Prince George's 357,395—ratios over 15 to 1.

We assume, but only for the purposes of the present argument,[29] that those discriminations might be shown rational if it were Maryland's policy to appor-

[28] The computations are all made from the tables attached to the dissenting opinion at R. 185–186.

[29] See pp. 24–25 above and pp. 57–90 below.

tion Senate seats on the basis of equality among counties. We also assume that the political history of the City of Baltimore and its present status as a separate political subdivision would justify allocating a seat to the city as if it were one of the counties. But the City of Baltimore receives six senators, not one. We can discover no possible justification for discriminating against the voters of Baltimore, Prince George's and Montgomery Counties as compared to both the City of Baltimore and the rural counties. The lack of uniformity apparently results from an exercise of sheer political power based upon *no* policy.

That the discrimination favors both the urban voters in Baltimore City and the rural voters in the sparsely populated counties over Baltimore, Prince George's and Montgomery Counties is vividly demonstrated by the following table:

County (or Balt. City)	Senators	Population (1960)	Population per senator	Ratio to Baltimore City	Ratio to 10 rural counties
Baltimore City	6	939,024	156,504	1.00	0.14
Ten rural counties	10	214,930	21,493	7.28	1.00
Baltimore	1	492,428	492,428	.32	.04
Prince George's	1	357,395	357,395	.44	.06
Montgomery	1	340,928	340,928	.46	.06

The arguments customarily made in support of apportionment on the basis of political or geographical subdivisions instead of voter-population or total population are inadequate support for the pattern of discrimination shown above. Every contention that can be made for geographical diffusion of voting power, for the avoidance of domination by the concentrated voting power in a large city, for reserving votes to give every locality some representative, or for avoiding excessively large districts, cuts against

favoring the voters of Baltimore City over the voters of Baltimore, Prince George's and Montgomery counties. Even if rural voters actually possessed their fabled superiority,[30] the voters of Baltimore, Prince George's and Montgomery Counties would come closer to possessing that enviable virtue than the people of Baltimore City, for surely even those who credit the fable do not believe that the supposed virtue resides in the country and large city but not in the small city or suburbs.

Perhaps the historical explanation of the award of extra senators to Baltimore City is partly that it

---

[30] For example, Henry J. Cookinham stated at the New York Constitutional Convention of 1894 (4 Revised Record of the Constitutional Convention of 1894 of the State of New York, pp. 10-11):

> I say without fear of contradiction, successful contradiction, that the average citizen in the rural district is superior in intelligence, superior in morality, superior in self-government, to the average citizen of the great cities. * * * I know what the culture of the great cities is. But I know, furthermore, that the lower strata of society in the great cities is such that when the balance is struck, and the average citizen is produced, he is not a citizen so well worthy of confidence as the average citizen in the rural districts. The stream will never be purer than the fountain, and the government is founded upon the average citizen and not the cultured and wealthy classes.

Another delegate to the same convention, in explaining the overrepresentation of rural areas at the expense of urban areas, stated (*id.* at 87):

> * * * that not only the population composed of many who were unfitted for citizenship but territory upon which live thousands of men not as great in number, but of greater force and power, and greater intellect, should also be represented; and that is the scheme of this apportionment.

was necessary to correct the most egregious inequity from the failure to apportion on the basis of population (Opinion below, R. 169). But the constitutionality of a statute is to be judged by its application to current conditions. *Chastleton Corp.* v. *Sinclair*, 264 U.S. 453; *Brown* v. *Board of Education*, 347 U.S. 483, 492–493. If Maryland is to add five senators to the upper house beyond one for each county and Baltimore City in order to take care of the most egregious inequalities—assuming the basic arrangement to be constitutional—equal protection requires the even-handed distribution of the additional seats. Balitmore City could receive, at most, three of the five additional seats and Baltimore County and Prince George's County would each receive one.[21]

It may be suggested that this attack upon the apportionment of the Maryland Senate as a crazy-quilt is captious because it would leave Maryland free to assign one senator to each county—an apportionment that would result in a much wider departure from the principle of majority rule. One answer is that such an apportionment would be unconstitutional for other reasons given below (pp. 57–90). Even if its validity be assumed, the argument cannot defeat the challenge to the present arbitrary discrimination between both Baltimore City and the rural counties, on the one hand, and Prince George's, Montgomery and Baltimore counties, on the other. Arbitrary dis-

[21] It can readily be calculated from the table on page 52 above that this is the distribution which would result from giving an additional seat up to five to the counties whose citizens would otherwise have the lowest *per capita* representation.

crimination has repeatedly been condemned by the Court in other contexts even though the decision left the State with power to subject the victim of the discrimination to the same regulation, or perhaps even to more severe regulation, provided that the law was applied even-handedly to all persons similarly situated. See, *e.g.*, *Griffin* v. *Illinois*, 351 U.S. 12, where the Court, after stating that a defendant has no constitutional right to an appeal, determined that, if the State allows appeals generally, it must ensure that indigents have adequate appellate review; *Skinner* v. *Oklahoma*, 316 U.S. 535, where the Court specifically refused to decide whether the sterilization of all habitual criminals would be constitutional, but held that it was unconstitutional to distinguish between those guilty of larceny and embezzlement; *Brown* v. *Board of Education*, 347 U.S. 483, where the Court, without holding that a State is constitutionally required to provide public schools at all, held that a school system providing separate-but-equal facilities for children of different races violated the equal protection clause.

Moreover, although the main thrust of the guarantee of equal protection is to protect those lacking political power against arbitrary discrimination, it also has the very practical consequence of discouraging unjust laws. If a legislature is forced to choose between applying an unjust law evenhandedly and abandoning the law, it may well choose the latter course. The same practical consequences are even more likely to follow the invalidation of arbitrary distinctions in apportioning seats in a legislative body.

The ability of a combination of forces to work out an apportionment of the Maryland Senate that gives control of the Senate to senators representing 14 percent of the people, but takes care of the City of Baltimore by favoring it over Prince George's, Montgomery and Baltimore counties, is no proof that minority control could be maintained if Baltimore City's representatives in the legislature or a constitutional convention were forced to recognize that there could be no discrimination in favor of Baltimore over other areas with large populations. The court below recognized that the favoritism towards Baltimore City assured its neutrality (R. 169–170):

> The instant case is a contest for political power between the larger and the smaller counties, and Baltimore City is not concerned.

If the arbitrary discrimination which operates as a purchase price for Baltimore's neutrality is invalidated, as we submit the Fourteenth Amendment requires, a new combination of political forces might well compel an apportionment that permitted majority rule.

Finally, we point out that the court of appeals erred in brushing aside the wholly capricious discrimination as "not far out of line" (R. 169). Baltimore and Prince George's counties contain 27 percent of the Maryland population. They have only seven percent of the votes in the Senate. Giving them the two senators that measure the hostile discrimination between them and Baltimore City at its minimum, would increase their share to 14 percent—

a grossly inadequate figure but double their vote today.

B. THE APPORTIONMENT OF THE MARYLAND LEGISLATURE VIOLATES THE EQUAL PROTECTION CLAUSE BY SUBORDINATING POPULAR REPRESENTATION TO THE REPRESENTATION OF POLITICAL SUBDIVISIONS TO SUCH A DEGREE AS TO CREATE GROSS INEQUALITIES AMONG VOTERS AND GIVE CONTROL TO SMALL MINORITIES IN BOTH HOUSES OF THE LEGISLATURE

We have already demonstrated the grave inequalities in *per capita* representation in the Maryland Senate. One-seventh of the people elects a majority of the senators. The House of Delegates is also apportioned in a manner that results in substantial inequalities. Thirty-six percent of the people elect a majority of the House. The disparity between voters in the most overrepresented and most underrepresented counties runs as high as 6 to 1. The discrimination runs in favor of the same rural areas in both houses, so that the imbalances tend to reinforce, not counteract each other. We submit that the resulting inequalities are so great and the departure from the principle of majority rule is so excessive as to constitute a denial of equal protection of the laws. As Chief Judge Brune, dissenting, said in the court below (R. 179):

> Geography simply cannot be divorced from people as a basis for representation. How large must the population of a geographical political subdivision be in relation to that of other subdivisions in order to afford a reasonable base for representation? We grant that no exact mathematical rule or guide should be attempted by this Court; but it seems to us that when the

disparity in population reaches the point where it has no rational justification, the limit of permissible discrimination is passed.

The gross inequalities may be further demonstrated by a few additional statistics. In the Senate the greatest disparity, measured by population, is between the voters of Kent County, who have one senator for 15,481 people, and the voters of Baltimore County, who have one senator for 492,428 people—a ratio of 32-1. Other examples, almost as dramatic, are readily available. There are eight counties—Calvert, Caroline, Garrett, Kent, Queen Anne's, Somerset, Talbot and Worcester—in each of which the voters have at least 20 times the representation *per capita* of a voter in Baltimore County.

The discrimination also runs against other large counties. The disparity between voters in Talbot and Prince George's is 16½ to 1; as between Garrett and Montgomery it is 16½ to 1; and between Queen Anne's and Anne Arundel it is 12½ to 1. Indeed, each of the voters in the eight small counties listed above has more than 8 times the representation of a voter in Anne Arundel, 14 times the representation of a voter in Montgomery, and about 15 times the representation of a voter in Prince George's.

The four populous counties suffering from those inequalities contain more than 40 percent of the people of Maryland, yet they are permitted to vote for only 13.7 percent of the Senate. On the other hand, the ten smallest counties, which have only 7 percent of the people, choose 34.5 percent of the

Senate. A majority of the Senate is elected by 14 percent of the people.

Under legislation enacted in 1962 the Maryland House of Delegates is apportioned two delegates to each of the 29 counties, two to each legislative district in the City of Baltimore and the remaining 65 delegates on the basis of population, but with the qualification that no county should have the number of its representatives reduced (Appendix A, pp. 92–94 below). The resulting inequalities in the House favor the same voters who are already overrepresented in the Senate. The people of Kent County, who have 32 times the *per capita* representation of the people of Baltimore County in the Senate, have 4.9 times their representation in the House. Again this is not an isolated example. There are eight counties with more than four times the *per capita* representation of voters in Baltimore County, nine with more than three times the representation of voters in Anne Arundel, and eight with more than four times the representation of voters in Montgomery and Prince George's. Only 36 percent of the people elect a majority of the delegates, and they include the even smaller minority—14 percent—who control the Senate.

Any attempt to compare the total representation of different counties is somewhat artificial because senators and delegates are incommensurable, but an estimate can be made by treating one senator as equal to five delegates, that being very nearly the ratio of the total number of senators (29) to the total num-

ber of delegates (142). The following table compares the total representation, thus calculated, of the eight smallest counties to the total representation of Baltimore, Prince George's and Montgomery Counties:

County	Population	Units of representation	Population per unit
Baltimore	492,428	18	27,357
Prince George's	357,395	15	23,826
Montgomery	340,928	15	22,728
Calvert	18,826	7	2,261
Caroline	19,462	7	2,780
Garrett	20,420	8	2,332
Kent	16,481	7	2,212
Queen Anne's	16,909	7	2,367
Somerset	19,623	8	2,453
Talbot	21,878	8	2,697
Worcester	23,733	8	2,966

On this basis every voter in each of the eight smallest counties receives eight to ten times the representation of voters in Baltimore, Prince George's or Montgomery counties.

To justify such great disparities—among the most marked in the United States—the strongest kind of showing should be required. The right to equal treatment as a voter, including the right to equal representation *per capita*, is among the most precious of civil rights. Our entire history teaches the ideals of voter equality and majority rule. The status of the right is shown (a) by constitutional history and practice and (b) in the decisions of the Court.

(a) We noted above (pp. 29–31) that equal voting rights for all Americans have been increasingly recognized through amendments to the Constitution and that population is the dominant criteria in State constitutions for apportioning their legislatures. Even

at the beginning of our history as a nation, the founding fathers were virtually unanimous in holding that basic fairness demanded that all voters be represented equally in the legislature.[32] Thus, Thomas Jefferson repeatedly denounced the inequality of representation provided by the Virginia Constitution of 1776 and just as often proposed changing the Constitution to provide that both houses be apportioned on the basis of population (Appendix B, pp. 114–117). For example, he said that "a government is republican in proportion as every member composing it has his equal voice in the direction of its concerns * * * by representatives chosen by himself * * *" (Appendix B, pp. 116–117). A few years later, he remarked that "[e]qual representation is so fundamental a principle in a true republic that no prejudice can justify its violation because the prejudices themselves cannot be justified" (Appendix B, p. 117). Several States, other than Virginia, which were unequally apportioned during the colonial period, changed their constitutions after independence to rectify the unfairness. Hacker, *Congressional Districting* (Brookings Institution, 1963), p. 5. And the Northwest Ordinance, which was adopted by the Congress of the Confederation in the same year that the constitutional convention was held, specified that "[t]he inhabitants of the [Northwest] [T]erritory shall always be entitled to the benefits * * * of a proportionate representation of the people in the legislature." Sec. 14, Art. II.

[32] The support for this statement is set forth at length in Appendix B to this brief, which is printed separately.

In the federal convention at Philadelphia, the framers of the Constitution made clear their common assumption that fair representation requires apportionment on the basis of population, voters, property, or taxes paid.[33] Throughout the convention, unequal apportionment was denounced in almost violent terms. Madison, for example, called it "evidently unjust," "a principle wch. was confessedly unjust, which ed. never be admitted," and "departing from justice" (Appendix B, pp. 4, 27, 38). James Wilson of Pennsylvania called inequality "a poison contaminating every branch of Govt." and "a vicious principle," and said that equal representation was "the inherent, indisputable, and unalienable rights of men" (Appendix B, pp. 12, 56, 31). Pierce Butler of South Carolina described the plan for giving each State an equal number of seats in the Senate as "evidently unjust"; Rufus King of Massachusetts likewise called it "a vicious principle of representation"; and Alexander Hamilton said that "[i]t shocks too much the ideas of Justice, and every human feeling" (Appendix B, pp. 39, 35, 14). See also, *e.g.*, the remarks of Madison (Appendix B, pp. 22, 24, 27, 39, 53, 60); Wilson (Appendix B, p. 6); Elbridge Gerry of Massa-

[33] Apportionment based on property or taxes paid was considered in the eighteenth century as a fair apportionment since these factors even justified denying the right of suffrage entirely. Thus arguments for apportionment based on taxes are arguments for equitable apportionment; they are inconsistent with allocating political subdivisions equal or minimum representation. Since that time, property and taxes have been rejected both as a qualification for suffrage and for apportionment except that poll taxes are still required to vote in some States and the New Hampshire Senate is apportioned on the basis of direct taxes paid from the several counties.

chusetts (Appendix B, pp. 29–30). In contrast, the delegates termed representation based on population "fair representation" (letter of George Mason of Virginia, Appendix B, p. 3), "just representation" (George Read of Delaware, Appendix B, p. 18), "the true, equitable mode of representation" (William Samuel Johnson of Connecticut, Appendix B, p. 54) and "the natural and precise measure" (Wilson, Appendix B, p. 56). See also Madison in the Federalist Papers (Appendix B, pp. 70–71).

The framers of the Constitution also specifically adverted to the apportionment of State legislatures in discussing the apportionment of the national legislature. Hugh Williamson, in arguing for representation based on population in the national legislature, "illustrated the cases by a comparison of the different States, to Counties of different sizes within the same State; observing that proportional representation was admitted to be just in the latter case * * *." I *Records of the Federal Convention* (Farrand ed., 1911), p. 180. Luther Martin of Maryland and James Madison of Virginia made clear that they agreed with this sentiment (see Appendix B, pp. 19–20, 23, 63–64).[34]

[34] As far as we can ascertain, only two brief remarks during the whole convention are inconsistent with those cited in the text above and with others included in Appendix B. Nathaniel Gorham of Massachusetts said that the moderate deviations from equality in the Massachusetts constitution were "expedient" (Appendix B, p. 18). Gouverneur Morris of Pennsylvania spoke approvingly of efforts in his own State to prevent backwoodsmen from having their fair representation in the legislature because he thought that they might attain control (Appendix B, p. 53). This was part of Morris' argument that the representation of new States in the national legislature should be limited so that they never could attain a majority. Madison and others vigorously opposed the proposal (Appendix B,

And on several occasions during the ratifying conventions various delegates, including Madison, attacked the unfair representation which then existed in some States (Appendix B, pp. 93–94, 98).[35]

While several of the States had one or more legislative bodies which were malapportioned at the time the Constitution was adopted, the situation had improved, as we have noted (p. 61), since colonial days. Three of the remaining malapportioned legislatures—South Carolina, Rhode Island, and Connecticut—were pointed to and severely criticized in the ratifying conventions (see Appendix B, pp. 93–94, 98). See also Jefferson's criticism of the Virginia apportionment provisions, Appendix B, pp. 114–117, and *Baker* v. *Carr, supra,* 369 U.S. at 309 (Mr. Justice Frankfurter dissenting). But even where a State provided the same representation for each county regardless of population, which on its face might lead to severe inequalities, the fairly even distribution of population generally mitigated the evil. For example, while the 1776 Maryland Constitution provided for the election of the Senate by two electors chosen by

---

p. 53), and the convention rejected it, as well as many of Morris' other ideas which were inconsistent with the prevailing, more democratic views.

[35] It is true that the framers provided in the new constitution for a Senate which was apportioned equally among the States instead of on the basis of population. However, as we show below, in showing the irrelevancy of the "federal analogy" to the United States Senate (pp. 73–82), this provision was in no way inconsistent with the accepted view that unequal representation, as measured by population, was fundamentally unfair in a government which directly governed the people. The framers saw no inconsistency because they saw the government being created as a mixture of the old confederation of States and a national government composed of the people of the whole country.

the people of each county and one apiece for Baltimore City and Annapolis, a minimum of 40 percent of the people was required to elect a majority of the electors. See pp. 82–83 below. Later, in our history, the movement of population to urban areas made the same methods of apportionment many times more discriminatory against urban centers. For example, equal representation of each county with the addition of seats for Baltimore City, now enables not 40 percent, but 14 percent of the people to elect a majority of the Senate.

In short, practice and democratic theory were not nearly so far apart in 1789 as today. But even if they were, what are most relevant are our aspirations, not our failures. Throughout our history, persons in power have all to often used it for their own ends. Nonetheless, in construing the First Amendment, the Court has looked to the nobler statements of Jefferson and Madison, not to the occasions on which church and State have been mixed or freedom of speech has been hindered. Similarly, we submit, the Court should look to the basic concepts of democracy of Jefferson, Madison, and the other founding fathers, not to the use of power by those living on the seacoast and then later by those living in rural areas to protect their own interests. For it is the basic notions of democracy which are incorporated into the equal protection and due process clauses of the Fourteenth Amendment.

(b) Just as history reveals the high value placed upon equal representation in government according to population, so do the decisions of this Court emphasize the high degree of justification required for

State discrimination in matters of personal liberty and political right. Stated generally, the criterion for judging the constitutionality of classifications is whether the differentiation is rational or is arbitrary and unreasonable (see the cases cited above, p. 33), but what justification is rational and what is arbitrary depends in large part upon the kind of inequality the State has created.

In passing upon the constitutionality of taxes and regulatory laws the Court allows a wide area of legislative discretion and will usually sustain all but invidious or fanciful differentiations lacking an intelligible basis. See, *e.g.*, *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61; *Railway Express Agency* v. *New York*, 336 U.S. 106. In contrast, where civil liberties are involved, far more than a merely intelligible classification is required. Inequality in punishment or technical procedure, for example, may be supported by distinctions between larceny and embezzlement, but they will not justify discrimination in permitting procreation. *Skinner* v. *Oklahoma*, 316 U.S. 535. In dealing with personal liberty the legislature may not draw distinctions that would support differences in taxation or social legislation. *Griffin* v. *Illinois*, 351 U.S. 12.

While the Court has occasionally upheld State action distinguishing between aliens and other residents (see *Terrace* v. *Thompson*, 263 U.S. 197), it has stated repeatedly that the mere rationality of the distinction is not sufficient. In *Oyama* v. *California*, 332 U.S. 633, 646, the Court said that "only the most exceptional circumstances can excuse discrimination

on [the basis of racial descent]" and therefore held unconstitutional a State statute forbidding aliens ineligible for citizenship from owning or leasing agricultural land. Accord, *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410.

The burden upon the State to justify classifications in matters of civil liberty was explicitly noted in *Skinner* v. *Oklahoma, supra.* At the very beginning of its opinion holding unconstitutional a statute providing for the sterilization of habitual criminals who have committed larceny but not those who have embezzled, the Court said (316 U.S. at 536):

> This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.

Later, in actually holding the statute unconstitutional, the Court went on to say (*id.* at 541):

> We are dealing here with legislation which involves one of the basic civil rights of men. Marriage and procreation are fundamental to the very existence and survival of the race. * * * [The sterilized person] is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.

The Court's special concern for equality of political rights, as well as personal liberty, was explicitly stated in *Yick Wo* v. *Hopkins*, 118 U.S. 356, where the Court held that the equal protection clause forbade the licensing of laundries in a manner which prohibited all laundries operated by Chinese subjects and permitted other laundries to continue. In reaching this decision, the Court analogized the right of livelihood to the right to fair participation in one's own government, the right which is involved in the instant case (*id.* at 370):

> [T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.
>
> There are many illustrations that might be given of this truth which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will under certain conditions, nevertheless *it is regarded as a fundamental political right, because preservative of all rights.* [Emphasis added.] [36]

The right to an equal voice in the processes of government is not only a personal right but goes to

---

[36] This Court's equal protection cases cited above are discussed in McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 Mich. L. Rev. 645, 672–677.

the heart of democracy. In *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, note 4, Mr. Justice Stone raised the question "whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." See also *Minersville School District* v. *Gobitis*, 310 U.S. 586, 599–600 (overruled on other grounds in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642). Writing specifically of legislation affecting the right to vote, Judge Cooley stated (2 Cooley, *Constitutional Limitations* (8th ed., 1927), p. 1370):

> All regulations of the elective franchise, however, must be reasonable, uniform and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void.

Discriminatory regulation of the right to equal representation, even more than restrictions upon freedom of communication, destroys the essential preconditions of alert democracy. Those whose voice is greatly diluted by malapportionment have almost no protection by exercise of their franchise. Inequalities such as those found in Maryland can be corrected only by self-destruction of the malapportioned legislature—a most unlikely eventuality—or by the courts,

or conceivably, but unlikely, by constitutional convention.[37]

---

[37] The apportionment of the Senate is fixed by Article III, § 2 of the Maryland Constitution, which can be changed only by constitutional amendment. Under Maryland law, this can be done in two ways: first, Article XIV, § 1 of the Maryland Constitution provides that by 3/5 vote of the membership of each House of the General Assembly a constitutional amendment may be submitted to the people for their approval by majority vote. As we have seen above (pp. 8, 13), the rural counties, which are greatly overrepresented in the legislature, elect 66 percent of the Senate and 44 percent of the House of Delegates. Thus, a substantial number of representatives of the rural counties in both houses would have to vote against their own and their counties self-interest to submit a constitutional amendment to the people.

Second, Articles XIV, § 2, and Article XVII, § 9, provide for taking "the sense of the People in regard to calling a Convention for altering this Constitution" in 1970 and every 20 years thereafter and that the legislature shall pass a statute at its next session calling a convention if "a majority of voters at such election * * * shall vote for a Convention." In 1950, the people of Maryland voted almost 4 to 1 in favor of calling a constitutional convention. Nonetheless, the legislature, dominated, as we have seen, by representatives of rural counties, rejected ten bills which would have actually called a convention and none has been called (see pp. 9–10 above). This issue of a constitutional convention will not appear on the ballot again until 1970.

Appellees suggest that the failure to call the convention was justified because less than half the voters at the election voted in favor of the convention since half the voters did not vote on the issue (R. 93–94). Assuming this is a correct construction of State law—the Maryland Court of Appeals said that it did not have jurisdiction to rule on this issue in its first decision because it constituted an abstract question of law (R. 62)—this demonstrates that the voters have no practical way to change the apportionment. As occurred in Maryland in 1950, large numbers of voters generally do not vote on referenda and such voters, coupled with those from rural counties, are very likely to constitute a majority. Moreover, the question of calling a constitutional convention raises many other difficult issues which may confuse the voters and

In addition to the quality of the right, the Court should take into account the degree of inequity. Slight differences may be supported upon grounds utterly inadequate to justify grosser discrimination. Even if a policy of recognizing governmental subdivisions will support some differentiation in *per capita* representation (see pp. 24–25 above), this is not enough to sanction the gross inequalities revealed in the present record. See *Baker* v. *Carr*, 206 F. Supp. 341, 345–346 (M.D. Tenn.) after remand by this Court); *Sims* v. *Frink*, 208 F. Supp. 431, 438 (M.D. Ala.), pending on appeal *sub nom. Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term; *Sobel* v. *Adams*, 208 F. Supp. 316, 321–323 (S.D. Fla.); *Mann* v. *Davis*, 213 F. Supp. 577, 584 (E.D. Va.), pending on appeal, No. 69, this Term; *Davis* v. *Synhorst*, 217 F. Supp. 492, 499 (S.D. Iowa); *Sweeney* v. *Notte*, 183 A. 2d 296, 301, 302 (R.I. Sup. Ct.).[38]

---

even those in favor of apportionment may vote against a convention on other grounds. See the government's brief in *WMCA, Inc.* v. *Simon*, No. 20 this Term, pp. 27–28.

Even if a constitutional convention is called, the constitution provides that delegates are to be apportioned the same as representatives in both houses of the legislature. Art. XIV, § 2. Thus, a majority of the delegates to the convention will be elected by the overrepresented rural counties. And finally, as we argue in our brief in the *WMCA* case, we do not believe that persons may be deprived of their personal constitutional rights merely because other persons have the opportunity to correct the inequality and do not choose to do so.

[38] The Rhode Island Supreme Court stated in *Sweeney* v. *Notte*, 183 A. 2d at 301:

> [A]pportionment along geographical, county, municipal or urban versus rural lines does not necessarily constitute a denial of equal protection if the rationale of such methods can be justified. * * * It is equally true that historical

Nor is it a fatal objection that this kind of evaluation poses questions of degree. The pricking out of shades of distinction, case by case, is the very essence of constitutional adjudication.

In theory, if there is room in one house of a bicameral legislature for some degree of representation of political subdivisions without strict regard to population, there would seem to be room for a lesser degree of deviation in both.[39] Nothing in the Four-

recourse to such apportionment formulae cannot be justified if it results in invidious discrimination. The dilution of the vote of a majority of electors to one fourth of that enjoyed by others is, in our opinion, so unjust as to be invidiously discriminatory.

In *Baker* v. *Carr*, the district court, after the remand from this Court, stated that (206 F. Supp. at 346):

> We find no basis for holding that the Fourteenth Amendment precludes a state from enforcing a policy which would give a measure of protection and recognition to its less populous governmental units. These subdivisions constitute an integral and historic part of the state's governmental structure. They have real and substantial interests in the state's laws, and the state could reasonably conclude that its best interests would be subserved by their effective participation in state government and in the formulation of its laws and policies. The state has the right, if it sees fit, to assure that its smaller and less populous areas and communities are not completely overriden by sheer weight of numbers.

However, the Court went on to state that this protection for smaller counties could not be accomplished in an arbitrary manner and held the new apportionment unconstitutional.

[39] The weight of authority since *Baker* v. *Carr* holds that the question whether an apportionment violates the equal protection clause cannot be answered without taking into account both houses of a bicameral legislature. *Sims* v. *Frink*, 208 F. Supp. 431, 439–440 (M.D. Ala.), pending on appeal *sub nom. Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term; *Sobel* v. *Adams*, 208 F. Supp. 316, 323 (S.D. Fla.); *Baker* v. *Carr*, 206 F. Supp.

teenth Amendment distinguishes between the two houses. In practice, the simplest and accepted way of accommodating different bases of representation is to follow one in the upper house and the other in the lower—an arrangement that may claim additional value as a check or balance.[40] Constitutional adjudication should not ignore either governmental practicalities or political tradition. If one house of a legislature is apportioned substantially in accordance with population, there may be room for variation in the other.[40a] But surely there can be no justification of substantial discrimination against the same people in their *per capita* representation in both houses.

No justification has been made—or, in our view could be offered—in the present case. The history and analogies on which the court below chiefly relied give no support for its decision.

(i). The United States Senate is distinguishable for two reasons. First, the principle of equal representation in the Senate, combined with popular representation in the House of Representatives, was part of an historic compromise between sovereign States agreeing to form a federal union. It was not a com-

---

341 (M.D. Tenn.) (after remand by this Court); *Nolan* v. *Rhodes*, U.S.D.C., S.D. Ohio, decided June 12, 1963; *Sweeney* v. *Notte*, 183 A. 2d 296, 302 (R.I. Sup. Ct.); *Maryland Committee for Fair Representation* v. *Tawes*, Circuit Court, Anne Arundel County, Maryland, decided May 24, 1962.

[40] As we show below (pp. 87–90), however, bicameralism and the desirability of a check and balance within the legislature do not require that one house deviate substantially from a fair apportionment based on population.

[40a] See pp. 24–25.

promise over what constitutes a fair apportionment; such compromises frequently occur and the manner in which an apportionment is decided is largely irrelevant in determining whether or not it is arbitrary and therefore violates the Fourteenth Amendment. The compromise in the constitutional convention was over the nature of the new union. Those who favored a legislature made up of one house with each State represented equally—the same apportionment as in the Congress of the Confederation—uniformly believed that the new government should merely be a reconstruction of the old Confederation, although with additional power to meet the problems the Confederation had been unable to solve. Thus, they saw the new government as a Confederation of sovereign States with powers in areas in which the individual States had been ineffective. On the other hand, the advocates of a legislature, whether made up of one or two houses, apportioned entirely according to population [41] invariably considered the proposed constitution as establishing an entirely new government operating directly on the people with the States in a decidedly subordinate role. Ultimately, because the deadlock over the basic nature of the government and the apportionment which depended on this question threatened to prevent the adoption of a new constitu-

[41] Some of the framers who would have varied the representation among the States supported apportionment based on property or taxes rather than population. However, as we stated above (p. 62, note 33), such proposals are today more consistent with apportionment based on population than with apportionment giving each political subdivision equal representation or guaranteed minimum representation.

tion, the delegates compromised. They deliberately decided to establish a government which operated directly on the people, but was composed of sovereign States. The House of Representatives was considered as representing the people, while the Senate represented the States. Thus, the apportionment of the Congress was seen as reflecting the nature of the new government—a mixture of a national government,[42] which would have required representation based on population, and a Confederation, which would have required equal representation from each of the States.

The nature of the compromise can best be understood from a few quotations. On the one hand, the proponents of the New Jersey or small-state plan for equal representation among the States agreed that, if a national government were formed, the only fair apportionment would be on the basis of population. Thus, William Paterson of New Jersey, who submitted the New Jersey plan to the convention, stated (I *Records of the Federal Convention* (Farrand ed., 1911), p. 178):

> A confederacy supposes sovereignty in the members composing it & sovereignty supposes

[42] The terms, national and federal government, were given various meanings at the convention. Regardless of the labels attached, however, Madison, Wilson and the others who supported representation based on population believed in a real national government, not a Confederation and not even the government, which they considered a mixture, that resulted.

> equality. If we are to be considered as a nation, all State distinctions must be abolished, the whole must be thrown into hotchpot, and when an equal division is made, then there may be fairly an equality of representation.[43]

Later, he said that apportionment based on population "is right in principle" if "state distinctions are done away; but those to certain purposes still exist." *Id.* at 259. Luther Martin of Maryland, a vigorous supporter of the small-state plan who ultimately opposed the Constitution, likewise said (*id.* at 453):

> In a federal government, a majority of states must and ought to tax. In the local government of states, counties may be unequal—still numbers, not property, govern. What is the government now forming, over states or persons? * * *
>
> * * * * * * * * * Your general government cannot be just or equal upon the Virginia plan [for apportionment based on population] unless you abolish state interests.

Similar remarks were made by other proponents of equality of representation among the States in Congress: David Brearly of New Jersey (Appendix B, p. 7); Robert Lansing of New York (Appendix B, p. 13); George Read of Delaware (Appendix B, p.

[43] Paterson is here referring to a proposal of David Brearly of New Jersey that, if the Confederation is to be ended, the States should be abolished, new States should be formed with equal population, and representation in the legislature should be the same for each State (see Appendix B, p. 7). Madison objected on the ground that the proposal was impractical (see Appendix B, p. 16).

31). In contrast, the proponents of the small-state plan favored equal representation among the States on the ground that the States were to remain sovereign. See the remarks of Paterson (Appendix B, pp. 6, 7, 11, 12); Brearly (Appendix B, p. 7); Roger Sherman of Connecticut (Appendix B, pp. 9, 25); Robert Lansing of New York (Appendix B, p. 13); Alexander Martin of North Carolina (Appendix B, p. 16); William Samuel Johnson of Connecticut (Appendix B, p. 17); Luther Martin of Maryland (Appendix B, pp. 19–21; 37), Oliver Ellsworth of Connecticut (Appendix B, p. 32); Gunning Bedford of Delaware (Appendix B, p. 36).

On the other hand, the most vigorous supporters of apportionment based on population agreed that equal representation among the States was appropriate if the government was to be a confederation of sovereign States.[*] For example, George Mason of Virginia said (*id.* at 161):

> The treaties, leagues, and confederacies between different sovereign, independent powers have been urged as proofs in support of the propriety and justice of the single and equal representation of each individual State in the American Union; and thence conclusions have been

[*] Occasionally supporters of apportionment based on population attacked the Confederation because the apportionment among the States equally (one vote per State) was unfair (see Appendix B, pp. 6, 29–30, 45, 60). The reasons for these attacks were the alleged extortion of this apportionment, and as is suggested in Madison's speech quoted in the text below on page 78, the view that even the Confederation was not made up of entirely sovereign States since it provided that the Confederation, not the States, had ultimate power over war and foreign affairs.

> drawn that the people of these United States would refuse to adopt a government founded more on an equal representation of the people themselves, than on the distinct representation of each separate, individual State. If the different States in our Union always had been as now substantially and in reality distinct, sovereign and independent, this kind of reasoning would have great force * * *.

Madison likewise said that (*id.* at 446):

> The fallacy of the reasoning [of the delegates supporting the New Jersey plan] drawn from the equality of Sovereign States in the formation of compacts, lay in confounding mere Treaties, in which specified certain duties to which the parties were to be bound, and certain rules by which their subjects were to be reciprocally governed in their intercourse, with a compact by which an authority was created paramount to the parties, & making laws for the government of them.

See also remarks of James Wilson of Pennsylvania (Appendix B, p. 13). The supporters of apportionment based on population invariably favored a sovereign national government with broad powers. See the remarks of Wilson (Appendix B, pp. 13, 18); Madison (Appendix B, pp. 22–23, 27, 60); Rufus King of Massachusetts (Appendix B, pp. 58–59); the letters of Mason (Appendix B, pp. 2, 3); the notes of Robert Yates of New York on the convention (Appendix B, pp. 37–38).

The framers explicitly described the resulting compromise as to the apportionment of Congress as reflecting a more basic compromise concerning the nature

of the government. William Samuel Johnson of Connecticut remarked (*id.* at 461–462):

> The controversy must be endless whilst Gentlemen differ in the grounds of their arguments; Those on one side considering the States as districts of people composing one political Society; those on the other considering them as so many political societies. The fact is that the States do exist as political Societies, and a Govt. is to be formed for them in their political capacity, as well as for the individuals composing them. * * * [A]s in some respects the States are to be considered in their political capacity, and in others as districts of individual citizens, the two ideas embraced on different sides, instead of being opposed to each other, ought to be combined; that in *one* branch the *people,* ought to be represented; in the *other* the *States.* [Emphasis in original.]

The compromise was repeatedly described in similar terms both in the convention itself and during the proceedings leading to ratification. See, *e.g.*, the remarks at the convention of Oliver Ellsworth of Connecticut (Appendix B, pp. 30–31); Roger Sherman of Connecticut (Appendix B, p. 9); William Richardson Davie of North Carolina (Appendix B, pp. 33–34); Elbridge Gerry of Massachusetts (Appendix B, pp. 39, 44); James Madison (Appendix B, p. 60); the remarks of George Cabot, Fisher Ames and E. Pierce at the Massachusetts convention and James Iredell at the North Carolina convention (Appendix B, pp. 90–91, 100); and Madison's writings in Numbers 39 and 62 of the Federalist Papers and in a letter to Jefferson (Appendix B, pp. 69, 71–72, 77–78).

In contrast to the federal government, even admitting, as the court below stated (R. 166), that the coun-

ties in Maryland have broad powers and have always been an important part of the government, they have never been sovereign and independent. As this Court said in *Hunter* v. *Pittsburgh*, 207 U.S. 161, 178, "[t]he number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State." Counties in Maryland, as elsewhere in the country, are mere subdivisions created by the State with no independent powers of their own. *E.g., Howard County Commissioners* v. *Matthews*, 146 Md. 553, 127 Atl. 118. The government of Maryland is not a mixture of a confederation of counties and a government operating directly on the people of Maryland. Consequently, there is no analogy to the federal government. The framers were in agreement that, as to a State government, with full powers directly over the people, both houses must be apportioned on the basis of population."

The second basis for distinguishing Maryland from the federal Congress is that, even if the federal and state governments could be compared, the second house of Congress, the federal House of Representatives, is apportioned among the States in accordance with population. The guarantee of one representative to each State works out quite differently from Mary-

"The Maryland Court of Appeals cited Madison for the proposition that the United States Senate was based on that of Maryland. However, as the appellants point out in their brief (pp. 46–47), the Maryland Senate was the model only for the indirect election of the Federal Senate. Madison repeatedly made clear at the constitutional convention and elsewhere that fairness demanded equal representation in the legislature on the basis of population. See Appendix B, pp. 4, 15–16, 22–24, 27, 33, 38–39, 45, 48, 53, 60–61, 70–71, 117–118.

land's guarantee of two delegates to each county and electoral district in Baltimore—plus guaranteeing each county and district at least the seats it had under a former apportionment deviating substantially from equality as measured by population—because there are enough seats in Congress to allow true distribution in accordance with population whereas in Maryland there are not nearly enough. Of the 435 incumbents of the House, only four come from States (Vermont, Wyoming, Nevada and Alaska) which have less than 1/435 of the population. It takes representatives from States with almost 50 percent of the population to constitute a majority of the federal House of Representatives [46]—but only 36 percent of the people can control Maryland's House of Delegates.

This Court has already rejected one federal analogy in *Gray* v. *Sanders*, 372 U.S. 368, 378, where the Court held unconstitutional the Georgia county unit system for the election of statewide officials. The Court explained (*id.* at 378):

> We think the analogies to the electoral college * * * are inapposite. The inclusion of the electoral college of the Constitution as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use

[46] Because of unfair districting by State legislatures, only 42 percent of the population reside in *districts* electing a majority of Congressmen. As our brief in *Wesberry* v. *Sanders*, No. 22, this Term, indicates (pp. 30–35), State statutes districting Congressmen so as to deviate substantially from an equal number of inhabitants in each district may very well be unconstitutional.

of an analogous system by a State in a statewide election.

The electoral college is just as analogous to the Georgia county unit system as the United States Senate is to the upper house of the State legislatures.

For the foregoing reasons there is no merit in the Court of Appeals' suggestion (R. 169) that Maryland and the United States are being judged by different rules."

(ii). There is nothing in Maryland's own history to vindicate the inequalities that exist today. The Constitution of 1776 (Article XIV) provided for the indirect election of the Senate. Two electors were chosen by the people from each county and one apiece from Baltimore and Annapolis Cities. The electors chose 15 senators, of whom 9 had to be from the western shore and 6 from the eastern. Based on the 1790 census, this resulted in 40 percent of the

---

" Except for the courts below, two other courts have relied on this "federal analogy" to the Congress in deciding the constitutional standard for apportioning State legislatures. *Toombs* v. *Fortson*, U.S.D.C., N.D. Ga., decided September 5, 1962; *Nolan* v. *Rhodes*, U.S.D.C., S.D. Ohio, decided June 12, 1963. Four courts have rejected the analogy. *Sims* v. *Frink*, 208 F. Supp. 431, 438 (M.D. Ala.), pending on appeal *sub nom. Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term; *Mann* v. *Davis*, 213 F. Supp. 577, 584 (E.D. Va.), pending on appeal, No. 69, this Term; *Sincock* v. *Duffy*, 215 F. Supp. 169, 186–187, 183 (D. Del.), pending an appeal, *sub nom. Roman* v. *Sincock*, No. 307, this Term; *Jackman* v. *Bodine*, 78 N.J. Super. 414, 188 A. 2d 642, 651 (despite upholding the apportionment on other grounds). See also *One Man-One Vote*, *supra*, pp. 8–9; McKay, *Reapportionment and the Federal Analogy* (National Municipal League, 1962), pp. 4–6, 8–9; McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 Mich. L. Rev. 645, 689–692.

people choosing a majority of the electors. As to the Senators themselves, the eastern shore had 40 percent, but only 34 percent of the population. An 1837 amendment to the Constitution ended the indirect election of Senators and provided for 1 senator from each county and 1 from Baltimore City. As a result, the Senate was controlled by representatives of 33 percent of the population. The 1851 Constitution (Article 3, Section 3) kept the same apportionment. This resulted, under the 1860 census, in reducing the percentage of the population necessary to elect a majority of the Senate to 29 percent. In 1864 the Constitution was changed (Art. III, Sections 2, 3) to give each county one senator and to give three to Baltimore City to be distributed among three legislative districts. This meant that, at the start, based on the 1860 census, 32 percent of the people elected a majority of the Senate. The 1867 Constitution (Article 3, Section 2) continued the previous apportionment of the Senate. In 1900 and 1922, amendments to the 1867 Constitution resulted in increasing the number of senators and legislative districts to four and six, respectively. Maryland Laws, 1900, ch. 469; *id.* 1922, ch. 7. Despite the increased representation for Baltimore City, the new apportionments following each amendment resulted in 23 and 21 percent of the people, respectively, electing a majority of the Senate. The percentage had fallen to 17 percent by 1940. Today it is only 14 percent.

In short, although her Senate has for many years been made up of an equal number of senators from each county (with additional senators from Baltimore

City), the inequalities in representation have been growing steadily greater as the relative population of four counties increased. Manifestly, the present extreme malapportionment finds no historical justification.

(iii). Nor can vindication be found in the practice of other States. Only seven other State constitutions apportion one house of the legislature wholly upon the basis of equality among political subdivisions regardless of population, and all those apportion the other house according to population except that they guarantee each political subdivision a minimum of one.[48] Maryland is one of the worst apportioned States in the country in the degree of inequality when measured by population. As of 1955, it was ranked forty-fourth among the then 48 States in representativeness. See I David & Eisenberg, *Devaluation of the Urban and Suburban Vote: A Statistical Investigation of Long-Term Trends in State Legislative Representation* (University of Virginia, 1961), p. 5. Since that time the increasing growth of urban areas has made the Senate even less representative than before, while the House of Delegates has been only slightly improved.

(iv). If we go behind history and analogies to the underlying reasons for recognition of political subdivisions, the lack of present justification for the inequalities of *per capita* representation in the Maryland legislature becomes all the more apparent, even if they were justified formerly. Geographic and political subdivisions are seldom any longer separate

[48] The seven States are listed on p. 46, note 23 above.

little communities with identities and interests of their own. People are more mobile. Newspapers, radio, and television produce a rapid interchange of knowledge and opinion upon a wider scale. More often than not geographical and political lines do not even correspond to community interests and social and economic organization.

For similar reasons it is easier for candidates to become known today in much wider circles than their own town or county, and for them to understand and speak effectively for interests beyond its immediate borders. On the other hand, the occasions for formally canvassing public issues in local communities as a unit in order to reach a consensus that its delegate might represent as its spokesman in the wider assemblage have gradually diminished.[49]

(v). On the facts of the present case it can scarcely be argued that the present apportionment of the Maryland legislature is necessary "to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former." *MacDougall v. Green*, 335 U.S. 281, 284. In the *MacDougall* case the Court was dealing not with representation in the legislature, but with the nomination of candidates for office by petition. In providing for nomination by signed petition there are strong reasons for re-

[49] Some of the Braintree town meetings which John Adams represented in the General Court of Massachusetts are described in I Smith, *John Adams* (1962), pp. 6–7, 80–81, 105.

quiring diffusion of the signers. A candidate without support in several areas would presumably have little chance for election in a statewide ballot. Moreover, it is probably much easier to obtain large numbers of signatures in counties having "concentrated masses" than in those "thinly populated." That the Court was addressing itself to those aspects of the process of nomination by petition, not representation, seems apparent not only from the issue before it but also from the use of the term "political initiative."

The same considerations are not applicable in the composition of a legislature. There is no evidence to support a claim that opportunities for effective political action are more available in urban or suburban areas than rural counties. The available evidence suggests that a higher proportion of the eligible voters casts ballots in rural counties than in metropolitan areas.[30a] There is no way in which populous counties can offset the effects of being underrepre-

[30] In Maryland there was 57.2 percent participation in the Presidential election in 1960. In Baltimore City the participation was 53.9 percent as against 58.7 percent for the rest of the State. In Prince George's County the participation was below the statewide average—53.4 percent whereas Baltimore County with 65.6 percent and Montgomery County with 66.3 percent were far above.

The figures from New York also tend to dispel the fiction of greater political opportunities on the part of urban voters. The statewide average was 67 percent participation whereas there was only 57.8 percent participation in New York City. The latter figure may be partially explained by the fact that the population totals, being made up of all persons 21 years of age and over, includes aliens and transients; there is a higher percentage of both in New York City.

sented in the legislature even by the most adroit political organization. "Bloc voting," *i.e.*, predictable voting, appears to be as prevalent in rural areas as in cities. See *One Man—One Vote, supra*, p. 7. Indeed, it may be argued with force that rural areas, with a less heterogeneous population and a closer identity of interest, have greater social pressures leading to political cohesion than do urban areas. See Emerson, *Malapportionment and Judicial Power*, 72 Yale L.J. 64, 73.

Granting that some degree of representation of political subdivisions may be a way of making certain that every significant area, however small in population, has some spokesman for its interests in the legislature, that consideration would not justify the present apportionment of the Maryland legislature. The allocation to each county of one seat in the House of Delegates would accomplish that objective. Today each county has two such seats and also equal representation in the Senate. As a result, virtually the entire Senate and 40 percent of the House is apportioned before taking into account the element of population. Surely, this makes "diffusion" a euphemism for gross discrimination.

(vi). It should also be apparent that there is no merit to the court of appeals' suggestion that the present apportionment or something like it is justified by the "very purpose of having two houses * * * that each would be a check upon the other, and prevent the passage of hasty and ill-conceived legislation" (R. 168). The gross inequalities in the representation of population or voters in the Maryland legislature is unnecessary to achieve the pur-

poses of a bicameral legislature. *First,* unless the senators and delegates were mere automatons reflecting the same estimates of sentiment in their constituencies, the very existence of two chambers would make one a check upon the other. Two bodies tend to develop different traditions and ideas. Moreover, the mere existence of a second body to scrutinize pending proposals slows down the legislative process and produces greater study and deliberation.[51] See, *e.g., Mann* v. *Davis* 213 F. Supp. 577, 584–585 (E.D. Va.), pending on appeal, No. 69, this Term, and the authorities therein cited; Wilson, *The State* (1898), pp. 487–489.

Second, there are ample other ways of providing a somewhat different composition of each body. The length of the terms of office might be made different.[52] The Maryland Senate has only 29 members as contrasted to 142 in the House. Senators will neccessarily represent larger areas than do delegates and consequently senators must be responsive to broader interests.[53] If one house were apportioned

[51] On returning from France after the constitutional convention, Jefferson is supposed to have asked Washington why he agreed to a second chamber in Congress: Washington, the story goes, replied: "Why did you pour that coffee into your saucer." Jefferson replied, "To cool it." "Even so," Washington said, "we pour legislation into the senatorial saucer to cool it." See III Records of the Federal Convention (Farrand ed., 1911), p. 359.

[52] The Maryland Constitution now provides for four-year terms for members of both houses. Art. III, Sections 2, 6.

[53] Congressmen from New York, for example, have a wide range of conflicting views which are generally different from those of New York's Senators who must represent and be responsive to the whole State.

by popular representation, perhaps there would be room for argument for the need to give some recognition of the principle of representation of established political subdivisions in the other, but the claim of need for a different basis of representation is utterly unavailing where neither house is apportioned according to population.

Third, the practice of the States in this country demonstrates that bicameralism is not inconsistent with the same apportionment of both houses. The constitutions of ten States have identical methods of apportionment in both houses.[54] Moreover, even in States where the apportionment methods appear to be substantially different, the effect is to have the same areas overrepresented and underrepresented in both houses. For example, this is true of both the apportionment in Maryland (see pp. 58–60 above) and of New York (see the Brief of the United States as Amicus Curiae in *WMCA, Inc.* v. *Simon,* No. 20, this Term, pp. 24–25, 33–34.

In short, history and political theory alike belie the suggestion that gross malapportionment is a prerequisite to a bicameral legislature. See United States Advisory Commission on Intergovernmental Relations; *Report, Apportionment of the State Legislatures, supra,* pp. 72–73; Hacker, *Congressional Districting: The Issue of Equal Representation, supra,* p. 37; *One Man—One Vote, supra,* pp. 9–11; McKay,

[54] The ten States with the same methods of apportionment in both houses are Indiana, Massachusetts, Minnesota, Oregon, South Dakota, Tennessee, Washington, West Virginia, Wisconsin, and Wyoming. All but Wyoming base the apportionment of both houses on population.

Reapportionment and the Federal Analogy, supra, pp. 9–10. When the malapportionment extends to both houses, the lesson is all the plainer.

The great weight of judicial opinion, since *Baker v. Carr,* is opposed to the decision of the Maryland Court of Appeals. All of the reasons which have been suggested in defense of the overwhelming disparities which prevail in the State of Maryland are plainly wanting. It is unnecessary to go further and to speculate upon other arguments which might conceivably be advanced. "Discriminations are not be be supported by mere fanciful conjecture." *Hartford Steam Boiler Inspection Co.* v. *Harrison,* 301 U.S. 459, 462; *Borden's Farm Products Co.* v. *Baldwin,* 293 U.S. 194, 209.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the Maryland Court of Appeals should be reversed.

ARCHIBALD COX,
Solicitor General.
BRUCE J. TERRIS,
Assistant to the Solicitor General.
RICHARD W. SCHMUDE,
Attorney.

SEPTEMBER 1963.

APPENDIX A

Sections 1, 2 and 5 of Article III of the 1867 Maryland Constitution, as amended, provide as follows:

Section 1.

The Legislature shall consist of two distinct branches; a Senate and a House of Delegates, and shall be styled the General Assembly of Maryland.

Section 2.

The City of Baltimore shall be divided into six legislative districts as near as may be of equal population and of contiguous territory, and each of said legislative districts of Baltimore City, as they may from time to time be laid out, in accordance with the provisions hereof, and each county in the State, shall be entitled to one Senator, who shall be elected by the qualified voters of the said legislative districts of Baltimore City and of the counties of the State, respectively, and shall serve for four years from the date of his election.

Section 5.

The membership of the House of Delegates shall consist of one hundred and twenty-three (123) Delegates, apportioned as follows: Calvert, Caroline, Charles, Howard, Kent, Queen Anne's, and St. Mary's Counties, two Delegates each; Cecil, Garrett, Somerset, Talbot and Worcester Counties, three Delegates each; Carroll, Dorchester, Hartford, and Wicomico Counties, four Delegates each; Allegany, Anne Arundel, Baltimore, Frederick, Montgomery, Prince George's, and Washington Counties, and each of the six legislative districts of Baltimore City, six Delegates each.

The Act of the Special Session of the Maryland General Assembly, ch. 1, approved May 31, 1962, which added Section 42 to Article 40 of the Maryland Code, provides as follows:

> *Section 1. Be it enacted by the General Assembly of Maryland,* That new Section 42 be and it is hereby added to Article 40 of the Annotated Code of Maryland (1957 Edition), title "General Assembly" to follow immediately after Section 41 thereof, and to be under the new sub-title "Apportionment," and to read as follows [Article 40, § 42, Maryand Annotated Code (1962) Supp.)]:
>
> (a) The membership of the House of Delegates shall consist of one hundred and twenty-three Delegates. Each county and each legislative district of Baltimore City shall have two Delegates as a minimum, making a total of fifty-eight (58) Delegates. The remaining sixty-five (65) Delegates shall be apportioned on a basis of relative population, as in this section provided.
>
> (b) There shall be an apportionment of representation in the House of Delegates in the following manner: Within one year after the publication of each census the Governor by proclamation shall announce the population determined in the census for each county and for each legislative district of Baltimore City. If the Federal census does not determine the population by legislative districts in Baltimore City, the Governor shall estimate the population of the several legislative districts by using the Federal census figures for wards and blocks within the City, or if that method is impractical, then by such other reliable method as may be feasible; and the Governor's determination of the population of each legislative district shall be conclusive. In the proclamation the Governor also shall announce the number of Delegates to which each county and legislative district is entitled according to the formula

and requirements contained in this section. At the time of the next regular election to the House of Delegates following such proclamation the number of Delegates specified in the proclamation shall be elected in the counties and legislative districts respectively. The apportionment above made shall continue until changed under the provisions of this section.

(c) Each county and each legislative district of Baltimore City shall be entitled to the minimum representation in the House of Delegates provided for in sub-section (a) of this section. Additional representation, subject to a total of sixty-five (65) additional Delegates and based on the population of each county and each legislative district as determined by each official decennial Federal census, shall be in accordance with the following formula:

The total population of the state according to the census shall be divided by the number sixty-five (65). The resulting quotient, computed as the nearest whole number, is the unit of population necessary for an additional Delegate. The unit of population, as divisor, shall then be divided into the population of each county in the state and of each legislative district of Baltimore City which has a population in excess of the unit of population. Each county and legislative district shall receive an additional number of Delegates equal to the resulting quotient in each instance, dropping any fractional remainder. If the total number of Delegates so apportioned is fewer than one hundred and twenty-three (123), additional Delegates shall be awarded in descending order to those counties or legislative districts having the highest fractional share of a unit of population as a remainder after the last mentioned quotients have been computed, until the total of one hundred and twenty-three (123) Delegates is apportioned.

(d) Not later than December 31, 1965, the Governor shall make the estimations of popula-

tion and the proclamation required in subsection (b), based upon the Federal census of 1960. The primary and general elections for the House of Delegates during the year 1966 shall be for such number of Delegates in each county and legislative district as previously determined under the provisions of this subsection; and this section is fully effective when the House of Delegates which is elected in November, 1966, has qualified and entered upon its term of office.

(e) Notwithstanding anything to the contrary in subsections (a), (b), (c) and (d) of this section, during the four-year term of the House of Delegates which is elected to office in November, 1962, and for any additional period during which this section may be extended each county and legislative district as a minimum shall have the number of Delegates in the House of Delegates that it had on January 1, 1962. For those four years, the formula for membership in sub-section (c) based upon the Federal census of 1960 shall be applied as to those counties and legislative districts for which it provides an increase in representation, but the formula shall not be applied as to those counties and legislative districts for which it would provide a decrease in representation, or as to which it leaves representation unchanged.

(f) In accordance with the formula in subsection (c), the number of additional memberships in the House of Delegates, for which nominations are to be made by the local central committees, is as follows: Anne Arundel County, 1; Baltimore County, 7; Montgomery County, 4; Prince George's County, 4; Third District of Baltimore City, 2; Fifth District of Baltimore City, 1.

(g) The local central committee of each party which was elected on May 15, 1962, in the several counties or legislative districts respectively, shall nominate persons as candidates for the House of Delegates for the additional

memberships herein created. These nominations shall be made prior to August 1, 1962.

(h) The nominees, in the respective numbers indicated in sub-section (f), shall be so declared. They shall become nominees for the particular party and in the particular county or legislative district, for the purposes of the general election in the month of November, 1962, in all respects the same as nominees already selected by the primary election of May 15, 1962, for the particular party and in the particular county or legislative district. All nominees so nominated by the local central committees who are elected to office at the general election in November, 1962, and who subsequently are sworn into office as members of the House of Delegates of Maryland, have all the powers, privileges and duties accorded generally to members of the House of Delegates.

(i) Nothing in this section shall be construed or applied to change or in any manner to affect the party conventions held pursuant to Article 33 of the Annotated Code of Maryland, title "Elections," during the year 1962.

(j) This section established the membership of the House of Delegates of Maryland until such time as it is superseded by an amendment for that purpose to the Constitution of Maryland. This section automatically and with no further action required by the General Assembly is repealed and no longer in force as of the effective date of such an amendment to the Constitution; except that such repeal does not affect the election, tenure, powers, privileges, and duties of any member of the House of Delegates in office at the time of the repeal, for the remainder of the term for which he has been elected.

Section 2. And be it further enacted, That this Act shall take effect on June 1, 1962. If this Act has not already been superseded by an

amendment to the Constitution of Maryland under the provisions of such sub-section (j) hereinabove, it shall expire automatically and with no further action required by the General Assembly of Maryland on January 1, 1966; provided, however, that if at the general election in the month of November 1964 there is submitted to the voters of the State of Maryland a proposed constitutional amendment which would so supersede the provisions of this section, and if at that time the voters of the State of Maryland reject and do not ratify this proposed constitutional amendment and the provisions of this Act shall expire automatically and with no further action required by the General Assembly of Maryland on January 1, 1970. In the event there is such an automatic repeal of this section either in 1966 or 1970 as provided hereinabove, the membership of the House of Delegates of Maryland thereafter shall be the same as it was in the several political sub-division and in its entirety on January 1, 1962. Nothing in such a repeal either in 1966 or 1970 shall affect the election, tenure, powers, privileges, and duties of any member of the House of Delegates in office at the time of the repeal for the remainder of the term for which he has been elected.